

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 724

FRANK A. DUSCH, ET AL., APPELLANTS,

vs.

J. E. CLAYTON DAVIS, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

Civil Action No. 4912

J. E. CLAYTON DAVIE, ROLLAND D. WINTER, CORNELIUS D. SCULLY and HOWARD W. MARTIN, who sue in behalf of themselves and all other citizens of the City of Virginia Beach, in the Commonwealth of Virginia, similarly situated, Plaintiffs,

vs.

FRANK A. DUSON, Member, City Council, City of Virginia Beach, 504 Cavalier Drive, Virginia Beach, Virginia,

JOHN McCOMBS, Member, City Council, City of Virginia Beach, The Traymore, 9th and Atlantic Streets, Virginia Beach, Virginia,

EDWARD T. CATON, III, Member, City Council, City of Virginia Beach, 418 22nd Street, Virginia Beach, Virginia,

W. H. KITCHIN, JR., Member, City Council, City of Virginia Beach, 203 Cavalier Drive, Virginia Beach, Virginia,

L. S. HODGES, Member, City Council, City of Virginia Beach, 4400 Holly Road, Virginia Beach, Virginia,

S. PAUL BROWN, Member, City Council, City of Virginia Beach, Route #2, Box 2123, Princess Anne Station, Virginia Beach, Virginia,

[fol. 2]

SWINDELL POLLOCK, Member, City Council, City of Virginia Beach, 309 Overland Road, Virginia Beach, Virginia,

[File endorsement omitted]

KENNETH N. WHITEHURST, Member, City Council, City of Virginia Beach, Bay Bay Station, Virginia Beach, Virginia,

LAWRENCE E. MARSHALL, Member, City Council, City of Virginia Beach, 8117 Brinson Arch, Virginia Beach, Virginia,

JAMES DARDEN, Member, City Council, City of Virginia Beach, 349 Laskin Road, Virginia Beach, Virginia,

EARL TREBAULT, Member, City Council, City of Virginia Beach, Rural Route #4, Hickory Back Bay Station, Virginia Beach, Virginia,

JOHN B. JAMES, Chairman, Electoral Board, City of Virginia Beach, 20 Bay Drive, Virginia Beach, Virginia,

HARRY BAILEY, Secretary, Electoral Board, City of Virginia Beach, 202 67th Street, Virginia Beach, Virginia,

JOSEPH T. CROSSWHITE, SR., Member, Electoral Board, City of Virginia Beach, 1107b Pacific Avenue, Virginia Beach, Virginia,

V. ALFRED ETHERIDGE, Treasurer, City of Virginia Beach, 9909 Thalia Drive, Virginia Beach, Virginia,

IVAN D. MAPP, Commissioner of Revenue, City of Virginia Beach, R. D. 4, Bayside, Virginia Beach, Virginia,

Defendants.

[fol. 3]

VOTERS' COMPLAINT TO CORRECT MALAPPORTIONMENT OF THE REPRESENTATION ON CITY COUNCIL OF THE CITY OF VIRGINIA BEACH FROM THE BOROUGHES OF THE CITY OF VIRGINIA BEACH—Filed December 29, 1964

I.

This Court has original jurisdiction of this action pursuant to 28 U. S. Code Section 1343 (3) and the plaintiffs have a right to bring this suit pursuant to the Civil Rights Act of the United States, 42 U. S. Code Sections 1983, 1988.

II

Under the provisions of 28 U. S. Code Sections 2281 and 2284 special provision is made for hearing causes of action involving restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state, whenever said application is based on the unconstitutionality of such statute.

III

The plaintiffs, J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, are citizens of the Commonwealth of Virginia; of the Boroughs of Lynnhaven, Bayside, Lynnhaven and Kempsville, respectively, in the City of Virginia Beach, Virginia; duly qualified voters, electors and taxpayers, who sue in behalf of themselves and all other citizens of the City of Virginia Beach, Virginia, similarly situated.

[fol. 4]

IV.

The defendants and each of them are citizens of the United States and of the Commonwealth of Virginia and reside in said Commonwealth and in the City of Virginia Beach, Virginia, and are sued in their representative capacities as hereinafter set forth:

A. The defendants, Frank A. Dusch, John McCombs, Edward T. Caton, III, W. H. Kitchin, Jr., L. S. Hodges, S. Paul Brown, Swindell Pollock, Kenneth N. Whitehurst, Lawrence E. Marshall, James Darden and Earl Teabault are members of the City Council of said City and have the duties and obligations, among others, of imposing taxes on real estate and prescribing other forms of taxation and to pass laws governing the appropriation and disbursement of such local revenues within the City of Virginia Beach and the boroughs thereof.

B. The defendants, John B. James, Harry Bailey and Joseph T. Crosswhite, Sr., are members of the Electoral Board of the City of Virginia Beach, Virginia, and said defendants are charged with supervising and co-ordinating and making rules and regulations for the conduct of City Councilmanic elections; preparing ballots and performing other duties in respect to said elections.

C. The defendant, V. Alfred Etheridge, is Treasurer of the City of Virginia Beach, Virginia, and has the duty, among others, of collecting taxes and disbursing funds in behalf of the City of Virginia Beach, Virginia.

[fol. 5] D. The defendant, Ivan D. Mapp, is Commissioner of Revenue of the City of Virginia Beach, Virginia; and has the duty, among others, of assessing property within the Boroughs of the City of Virginia Beach, Virginia, for the purpose of taxation.

V.

Plaintiffs are now denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States of America. Plaintiffs bring this action on their own behalf and on behalf of all other residents of the City of Virginia Beach and the boroughs thereof who are similarly situated. Plaintiffs seek a declaration of their rights and a declaration of the validity or invalidity of the acts and statute of the Commonwealth of Virginia which created the charter of the City of Virginia Beach and in particular those provisions which constituted the City Council of the City of Virginia Beach and the apportionment of representation among the boroughs of said city. They further seek such injunctive relief as may be proper to assure them and all other voters of the City of Virginia Beach the free and equal franchise of the equal protection of the laws to which they are entitled under the Fourteenth Amendment to the Constitution of the United States and which rights are now being denied

them by the defendants who have been, and are complying with unconstitutional statutes and private acts as hereafter more particularly set forth.

VI.

Pursuant to a Consolidation Agreement between the [fol. 6] City of Virginia Beach, Virginia, and Princess Anne County, Virginia, the corporate limits of the City of Virginia Beach that existed prior to January 1, 1963, were extended to include all lands and persons included within the exterior limits of Princess Anne County, Virginia, as of January 1, 1963, and on or after that date a City Council for the City of Virginia Beach was constituted pursuant to the provisions of Section 3.01 of the Charter of Virginia Beach, which charter was granted by an Act of the General Assembly of Virginia in 1962, which charter provision reads as follows:

"Section 3.01 COMPOSITION. The city shall be divided into seven boroughs. One of such boroughs shall comprise the City of Virginia Beach as existing immediately preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the remaining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, five of whom shall be elected by and from the borough of Virginia Beach and one by and from each of the other six boroughs. The five members of the council of the City of Virginia Beach and the six members of the Board of Supervisors of Princess Anne County holding office immediately preceding the effective date of this charter shall constitute the council of the city and shall hold office until the beginning of the terms of their successors.

At such time as may be determined by the affirmative vote of seven councilmen, which shall not be earlier than five years after the effective date of this charter, but not later than September 1, 1971, the council shall submit to the qualified voters of the city a new plan for election of councilmen."

VII.

The aforesaid City Council approved and has maintained municipal governmental districts, which, according to the [fol. 7] official 1960 census of the United States, contained the following number of persons:

Representation On Council	District	Population Per District—1960
1	Blackwater	733
1	Pungo	2,504
1	Princess Anne	7,211
1	Kempsville	13,900
1	Lynnhaven	23,731
1	Bayside	29,048
5	Virginia Beach	8,091

It is the duty of the aforesaid defendant City Councilmen to constitute the municipal governmental districts of the City of Virginia Beach in such a manner that representation will, as far as practicable, be in proportion to the population of such district, or in the alternative to conduct elections for councilmen on an at large basis. An official copy of the United States Census of population is attached to the original of this Complaint, marked as Exhibit "A" for identification and made a part of this complaint by reference.

VIII.

The boroughs in which the plaintiffs reside are the fastest growing boroughs in the City of Virginia Beach and the

disparities in population existing between the boroughs of Virginia Beach as of the 1960 census are increasing and becoming more aggravated each year, the said boroughs having a population as of January 1, 1964 as follows:

[fol. 8]

District	Population
Blackwater	862
Pungo	2,806
Princess Anne	7,957
Kempsville	22,254
Lynnhaven	37,760
Bayside	36,027
Virginia Beach	10,473

IX.

The composition and organization of the City Council of Virginia Beach, Virginia, is as follows:

Representation On Council	District	Population Per District 1960	Projected Population/ Per District, January 1, 1964
1	Blackwater	733	862
1	Pungo	2,504	2,806
1	Princess Anne	7,211	7,957
1	Kempsville	13,900	22,254
1	Lynnhaven	23,731	37,760
1	Bayside	29,048	36,027
5	Virginia Beach	8,091	10,473

X.

Plaintiffs aver that the composition and organization of the City Council of the City of Virginia Beach, Virginia, as presently existing has resulted and will continue to result in invidious discrimination against your plaintiffs and all other inhabitants of the municipal governmental districts known as Lynnhaven Borough, Bayside Borough and Kempsville Borough, in which the plaintiffs reside

and against the inhabitants of other municipal governmental districts of the City of Virginia Beach, Virginia. [fol. 9] Plaintiffs, as citizens of the United States of America, the Commonwealth of Virginia, and the City of Virginia Beach, Virginia, possess an inherent right to equal representation on the City Council of the City of Virginia Beach, Virginia, but by virtue of the invidious discrimination practiced by the Council of the City of Virginia Beach, Virginia, in composing and organizing itself in the manner heretofore detailed, the residents of Lynnhaven Borough, together with the residents of Kempsville Borough and Bayside Borough, are grossly under-represented on the said Council, the three boroughs being allocated one Councilman each, or a total of three for a population, according to the 1960 census, of 65,676, whereas the residents of the Boroughs of Virginia Beach, Blackwater, Pungo and Princess Anne are allocated eight Councilmen for a total population of 18,539. As a further example of the unconstitutional effects of the discriminatory dilution of the weight of a voter's ballot in the Bayside Borough, plaintiffs state that the Councilman for the said Borough represented 28,045 persons pursuant to the 1960 census and the Councilman from the Blackwater Borough represented only 733 persons. By reason of the foregoing gross and aggravating disparity, the voice and vote of the resident of Blackwater is forty times more influential than the voice and vote of a resident of Bayside Borough. Stated in the alternative, the ballot potency of a resident of Blackwater Borough is forty times greater than that of a resident of Bayside Borough. The population growth in the suburban Boroughs of Kempsville, Lynnhaven and Bayside is much more rapid than in the now favored and weighted Boroughs of Blackwater, Pungo, Princess Anne and Virginia Beach, so that with each pass- [fol. 10] ing year the discrimination against plaintiffs and other residents of the aforesaid suburban Boroughs will become more acute and invidious.

XI.

That the total taxes to be realized from real estate as of the April 1964 assessments in the City of Virginia Beach, is \$4,145,821.54. Of this sum of \$970,850.04 will be realized from Bayside Borough; \$707,124.54 from the Kempsville Borough and \$1,471,431.02 from Lynnhaven Borough, or a total from these three districts of \$3,149,405.60, which sum represents 75% of the total taxes realized from real estate for the entire city. 78% of the population of the City of Virginia Beach resides in the three boroughs in which the plaintiffs reside and yet the plaintiffs only have three representatives on the eleven man Council of said city, or a total of 27% of the representation on said Council.

By reason of this unconstitutional discrimination in representation, plaintiffs and those similarly situated have an ineffective influence and are deprived of the equal protection of the laws in the manner in which tax revenues are appropriated and disbursed.

XII.

Plaintiffs aver that when all of the many inequalities in the above mentioned charter provisions constituting the City Council of the City of Virginia Beach are considered together, they result in a distortion of the constitutional system as established, defined and guaranteed by the Four- [fol. 11]teenth Amendment to the Constitution of the United States and that this distortion prevents the City Council of the City of Virginia Beach from being a body representative of the City of Virginia Beach and denies to plaintiffs the equal protection of the laws. Plaintiffs further aver that as result thereof a minority of the people of the City of Virginia Beach control and will continue to control the deliberations and decisions of the City Council of the City of Virginia Beach contrary to the Constitution of the United States of America.

XIII.

Plaintiffs aver that the unconstitutional apportionment aforesaid can be made constitutional only by redistribution of representation on the Council of the City of Virginia Beach among the Boroughs of said city substantially in proportion to their respective populations or by having an election forthwith whereby the Council will be elected on an at large basis, and unless the inequities herein complained of are corrected by this Court the plaintiffs and all others similarly situated will continue to be denied the equal protection of the laws and each day that the malapportioned Council of the City of Virginia Beach continues to function the plaintiffs herein will be irreparably damaged.

Wherefore, plaintiffs pray:

I. That this Court may take jurisdiction of this controversy.

II. That a special three-judge court be called and impanelled to hear and determine this action and to declare the rights of plaintiffs in the premises to be as follows:

[fol. 12] A. That the present apportionment of the Council of the City of Virginia Beach, Virginia, denies the plaintiffs and others similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America.

B. That the Charter of the City of Virginia Beach as created and granted by the Commonwealth of Virginia insofar as it relates to the composition of the Council thereof as now in force is unconstitutional and void.

C. That upon final hearing of this action this Court will grant to the plaintiffs the following relief:

(1) That the defendant Councilmen, Commissioner of Revenue and City Treasurer be permanently restrained and enjoined from assessing and collecting taxes, selling bonds or appropriating revenues therefrom until a constitutionally

representative City Council be constituted, but that the force and effect of said injunction be stayed for a period of three months from the date of entry of this Court's decree to enable the City Council of the City of Virginia Beach and the defendant members of the Electoral Board of the City of Virginia Beach to reapportion the Boroughs of the City of Virginia Beach so that they contain, as nearly as practicable, the same number of inhabitants and hold elections to fill the offices of City Council as reapportioned, or, in the alternative, to hold elections for an at large election of the said members of said City Council within a period of three months from the date of entry of said decree.

(2) That the defendant members of the Electoral Board of the City of Virginia Beach, Virginia, be enjoined from [fol. 13] printing ballots or holding any elections whatsoever for members of Council until there be a constitutional reapportionment of the representation on the Council of the City of Virginia Beach, Virginia.

(3) That plaintiffs may have such other, further and alternative relief as the nature of this action may require and this Court may deem proper.

J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully, Howard W. Martin.

Subscribed and sworn to before me this 22nd day of December, 1964.

Catherine J. Crane, Notary Public.

My commission expires November '8, 1965.

Howell, Anninos & Daugherty, 808 Maritime Tower, Norfolk, Virginia, Counsel for Plaintiffs.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

No. 4912

[Title omitted]

DESIGNATION OF THREE-JUDGE COURT
—Filed January 7, 1965

It appearing to the undersigned Chief Judge of the Fourth Judicial Circuit of the United States that a civil action as above entitled has been instituted in the United States District Court for the Eastern District of Virginia, the stated purpose of which is to restrain the enforcement, operation, or execution of the acts and statute of the Commonwealth of Virginia which created the charter of the City of Virginia Beach, and, in particular, those provisions which constituted the City Council of the City of Virginia Beach and the apportionment of representation among the boroughs of the said City, to the end that injunctive relief may be secured to give to the plaintiffs and all other voters of the City of Virginia Beach the free and equal franchise and the equal protection of laws to which they are allegedly [fol. 16] entitled under the Fourteenth Amendment to the Constitution of the United States and which rights are now allegedly being denied them by the defendants who are allegedly complying with unconstitutional statutes and acts as stated in said complaint; and that application for injunction was made to Honorable Walter E. Hoffman, United States District Judge for the Eastern District of Virginia, who has notified the undersigned, pursuant to § 284 of Title 28, United States Code Annotated, of the pendency of said application, to the end that a court of

[File endorsement omitted]

three judges may be constituted, as required by § 2281, Title 28, United States Code Annotated.

Now, therefore, I do hereby designate Honorable Albert V. Bryan, United States Circuit Judge, Fourth Judicial Circuit, and Honorable John D. Butzner, Jr., United States District Judge for the Eastern District of Virginia, to serve with the said Honorable Walter E. Hoffman in the hearing and determination of the above entitled action, as provided by law, the three to constitute a District Court of three judges as provided by § 2284, Title 28, United States Code Annotated.

This the 5th day of January, 1965.

Clement L. Haynsworth, Jr., Chief Judge, Fourth Circuit.

[fol. 19]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
Civil Action No. 4912

[Title omitted]

ANSWER—Filed January 25, 1965

For answer to the Complaint filed by the plaintiffs, J. E. Clayton Davis, et al., the defendants, Frank A. Dusch, et al., state as follows:

1. Defendants deny the allegations of paragraph I. As this action is brought against local officials to change the manner of election of city councilmen, no federally protected right is involved and no justiciable issue recognizable in this Court has been presented.

[File endorsement omitted]

2. Defendants admit that 28 U. S. Code Sections 2281 and 2284 contain provisions substantially as stated in paragraph II but deny that the requisite grounds for convening a three-judge court are present in this action. Although this action may seek to restrain the enforcement, operation or execution of a state statute, it seeks to do so by restraining the actions of purely local officials rather than state officers.

3. Defendants deny that the plaintiffs sue on behalf of [fol. 20] all other citizens of the City of Virginia Beach, Virginia, similarly situated but admit all other allegations of paragraph III.

4. The allegations of paragraph IV are admitted.

5. Defendants deny the allegations of paragraph V that the Charter of the City of Virginia Beach or any acts or statutes of the Commonwealth of Virginia granting such charter are invalid in any respect. Defendants further deny that the plaintiffs or any other citizens of the City of Virginia Beach are in any way denied any rights guaranteed to them by the Fourteenth Amendment to the United States Constitution.

6. The allegations of paragraph VI are admitted.

7. The municipal governmental districts of the City of Virginia Beach, their population and representation on the City Council as alleged in paragraph VII are admitted. Defendants deny all other allegations of this paragraph.

8. Defendants admit the allegations of paragraph VIII as to the rapid growth of Bayside, Kempsville and Lynnhaven boroughs. As there has been no census since 1960, the defendants are not informed as to the population of the boroughs at January 1, 1964, and call for strict proof thereof.

9. Defendants admit that unofficial population projections at January 1, 1964, have been made as alleged but are not informed as to their accuracy and call for strict

proof thereof. All other allegations of paragraph IX are admitted.

10. The allegations of paragraph X are denied.

11. Defendants admit that the allegations of the first [fol. 21] three sentences of paragraph XI are substantially correct but deny the allegations of the last sentence.

12. The allegations of paragraph XII are denied.

13. The allegations of paragraph XIII are denied.

Wherefore, the defendants pray that the Court dismiss this action for lack of jurisdiction of the matter in controversy. In the event the Court should determine it has jurisdiction the defendants pray that the matter be heard by the District Judge alone and that the request for a special three-judge court be denied; that the Court determine that the present apportionment of the Council of the City of Virginia Beach does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution; that the Charter provisions regarding the composition of the City Council are not unconstitutional; that the orderly administration of the affairs of the City requires that in no event should an injunction be granted restraining the City Councilmen, Commissioner of Revenue and Treasurer, or any of them, from assessing and collecting taxes, selling bonds or appropriating revenues for the government of the City; that all other relief requested by the plaintiffs be denied; and that the Complaint be dismissed.

Frank A. Dusch, John McCombs, Edward T. Caton, III, W. H. Kitchin, Jr., L. S. Hodges, S. Paul Brown, Swindell Pollock, Kenneth N. Whitehurst, Lawrence E. Marshall, James Darden, Earl Teabult, John B. James, Harry Bailey, Joseph T. Crosswhite, Sr., V. Alfred Etheridge, and Ivan D. Mapp, George W. Vakos, Harry Frazier III, Counsel for Defendants.

[fol. 22] George W. Vakos, City Attorney, 201 Courthouse Drive, Princess Anne Station, Virginia Beach, Virginia 23456.

Archibald G. Robertson, Harry Frazier, III, Hunton, Williams, Gay, Powell & Gibson, 1003 Electric Building, Richmond, Virginia 23212.

Certificate of Service (omitted in printing).

[fol. 25]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Civil Action No. 4912

[Title omitted]

MOTION TO DISMISS—Filed March 15, 1965

Defendants Frank A. Dusch, et als., respectfully request the Court to dismiss this action without prejudice to the rights of the plaintiffs to reinstitute the action (a) following the adjournment of a special session of the General Assembly of Virginia if held during 1965 and if no bill is introduced at such session to amend the plan of representation on the Council, as set out in the charter of the City of Virginia Beach, or (b) following adjournment of the 1966 session of the General Assembly if no such bill is enacted or (c) at any time after the enactment of such a bill.

In support of this motion defendants represent that on February 23, 1965, the Council of the City of Virginia Beach by unanimous vote adopted a resolution recognizing the need for prompt change in the plan of representation on

[File endorsement omitted]

the Council and obligating itself to request its representatives in the General Assembly to undertake to have the charter of the City of Virginia Beach amended at the earliest opportunity to provide a new plan of representation [fol. 26] under which the vote of one citizen will be substantially equal to the vote of every other citizen in the city. A certified copy of such resolution is attached hereto and made a part hereof.

Defendants respectfully request that this motion be heard either alone or together with questions of jurisdiction and convening a three-judge court, but in any event prior to a hearing on the merits.

Frank A. Dusch, John McCombs, Edward T. Caton, III, W. H. Kitchin, Jr., L. S. Hodges, S. Paul Brown, Swindell Pollock, Kenneth N. Whitehurst, Lawrence E. Marshall, James Darden, Earl Teabult, John B. James, Harry Bailey, Joseph T. Crosswhite, Sr., V. Alfred Etheridge, and Ivan D. Mapp, Harry Frazier III, Counsel for Defendants.

George W. Vakos, City Attorney, 201 Courthouse Drive, Princess Anne Station, Virginia Beach, Virginia 23456.

Archibald G. Robertson, Harry Frazier, III, Hunton, Williams, Gay, Powell & Gibson, 1003 Electric Building, Richmond, Virginia 23212.

Certificate of Service (omitted in printing).

[fol. 27]

ATTACHMENT TO MOTION

On motion by Mr. Kitchin, seconded by Mr. Marshall and by unanimous vote, the following resolution was adopted:

Resolution

Whereas, the consolidation agreement dated November 10, 1961, between former Princess Anne County and the

City of Virginia Beach and the charter granted by the General Assembly pursuant to such agreement provide that the system of election of councilmen may be changed on the initiative of the Council after January 1, 1968, and must be changed before September 1, 1971; and

Whereas, the two political subdivisions were consolidated on January 1, 1963, and the City of Virginia Beach has progressed under its new government with greater speed and harmony than had been anticipated; and

Whereas, the drastic changes in concepts of representation brought about by decisions of the United States Supreme Court since the adoption of the city's present plan of representative have called into question the wisdom of continuing this plan; and

Whereas, members of the Council have recognized the inequalities of the present plan and are of opinion that the public interest requires that the plan be changed sooner than January 1, 1968.

Now, Therefore, Be It Resolved by the Council of the City of Virginia Beach, Virginia:

1. The present plan of representation of the Council of the City of Virginia Beach should be replaced as soon as practicable by a new plan providing substantial equality of representation.

2. The Council hereby commits itself to initiate a new plan for representation of the Council and to request its representatives in the General Assembly to introduce a bill at the earliest opportunity to amend the charter of the City of Virginia Beach to effectuate such plan and to urge its representatives to press for the prompt passage of such bill.

3. The plan will provide for the election of councilmen by one of the following methods so that under any plan the vote of one citizen will be substantially equal to the vote of every other citizen in the city:

[a] election of councilmen at large;

[b] election of councilmen by and from districts of substantially equal population;

[c] election of councilmen from districts but with each councilman voted on at large;

[d] a combination of councilmen elected at large under plan [a] and councilmen elected from districts under plan [b] or plan [c].

4. Although it is the sense of the Council that councilmen now in office should serve out their elected terms and that the first election of councilmen under the new plan should take place in June, 1967, the Council is willing to hold new elections in June, 1966, if so required by the amendment to its charter or otherwise.

Councilmen present: Mayor Frank A. Dusch, S. Paul Brown, James G. Darden, L. Stanley Hodges, W. Hugh Kitchin, Jr., Lawrence E. Marshall, John W. McCombs, Swindell Pollock, Kenneth N. Whitehurst and Earl M. Tebault.

Councilmen absent: Edward T. Caton, III.

Voting aye: Dusch, Brown, Darden, Hodges, Kitchin, Marshall, McCombs, Pollock, Whitehurst and Tebault.

Voting nay: None.

Adopted by the Council of Virginia Beach, on February 23, 1965.

[fol. 30]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Civil Action No. 4912

[Title omitted]

VOTERS' AMENDED COMPLAINT TO CORRECT MALAPPORTION-
MENT OF THE REPRESENTATION ON CITY COUNCIL OF THE
CITY OF VIRGINIA BEACH FROM THE BOROUGHES OF THE
CITY OF VIRGINIA BEACH—Filed March 24, 1965

I.

Plaintiffs adopt each and every allegation contained in
the original complaint filed herein as if restated herein.

II.

Plaintiffs add as parties defendant, William P. Kellam
and P. B. White, who are sued in their capacities as state
officers representing the City of Virginia Beach in the House
of Delegates of the General Assembly of Virginia, and
whose duties, among others, is the proposal of amendments
to the Charter of the City of Virginia Beach.

III.

Paragraph C. (1) of the prayer of the original complaint
is amended to read as follows:

[fol. 31] "(1) That the defendant Councilmen, Commis-
sioner of Revenue and City Treasurer be permanently re-
strained and enjoined from assessing and collecting taxes,
selling bonds or appropriating revenues therefrom until a

[File endorsement omitted]

constitutionally representative City Council be constituted, but that the force and effect of said injunction be stayed for a period of three months from the date of entry of this Court's decree to enable the defendant members of the City Council of Virginia Beach and the defendant State Legislators from the City of Virginia Beach to obtain such changes in the Charter of said city so as to reconstitute a constitutional City Council and that promptly upon the changes in said Charter that the defendant members of the Electoral Board be directed to hold elections to fill the Councilmanic offices of the constitutionally constituted Council not later than April 15, 1966."

J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, By: Henry E. Howell, Jr., Of Counsel.

Duly sworn to by Henry E. Howell, Jr., jurat omitted in printing.

[fol. 32] Howell, Anninos & Daugherty, 808 Maritime Tower, Norfolk, Virginia, Counsel for Plaintiffs.

[fol. 35]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 4912

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed April 19, 1965

For answer to the amended complaint the defendants, Frank A. Dusch, et als., adopt the answer filed on or about January 1, 1965, to the original complaint as if such answer were restated herein.

[File endorsement omitted]

Answering further, defendants William P. Kellam and P. B. White admit that they are now members of the General Assembly of Virginia elected from the 56th District, comprising the City of Virginia Beach, but deny that their duties include the proposal of amendments to the charter of the City of Virginia Beach or any other city. Any one of the one hundred members of the House of Delegates or the forty members of the Senate have the same authority to propose amendments to the charter of Virginia Beach or any other city in the Commonwealth. Accordingly, these defendants request that the amended complaint be dismissed as to them.

All defendants renew the prayer to the answer to the original complaint and pray further the relief sought by [fol. 36] paragraph C(1) of the prayer of the amended complaint also be denied.

Frank A. Dusch, John McCombs, Edward T. Caton, III, W. H. Kitchin, Jr., L. S. Hodges, S. Paul Brown, Swindell Pollock, Kenneth N. Whitehurst, Lawrence E. Marshall, James Darden, Earl Teabult, John B. James, Harry Bailey, Joseph T. Crosswhite, Sr., V. Alfred Etheridge, Ivan D. Mapp, William P. Kellam and P. B. White, Harry Frazier III, Counsel for Defendants.

George W. Vakos, 201 Courthouse Drive, Princess Anne Station, Virginia Beach, Virginia 23456.

Archibald G. Robertson, Harry Frazier, III, Hunton, Williams, Gay, Powell & Gibson, 1003 Electric Building, Richmond, Virginia 23212.

Certificate of Service (omitted in printing).

[fol. 37]

IN THE
SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

J. E. CLAYTON DAVIS, et al., etc.,

v.

FRANK A. DUSCH, et al., etc.

Record No. 5928

Petition for Writ of Mandamus

[fol. 38]

TRANSCRIPT OF DEPOSITIONS—June 8, 1964

[fol. 39] ROBERT FITZHUGH NEWSOME, witness first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

Direct examination.

Examined by Mr. Howell:

Q. State your full name, sir.

A. Robert Fitzhugh Newsome.

Q. And what position do you hold with the City of Virginia Beach?

A. I am the Economist on the Professional Staff of the Planning Commission.

Q. Can you state, by borough, the population figures allocated to each borough by the official 1960 census?

A. Yes, I can.

1960 Census Figures By Borough in the City of Virginia Beach:

[fol. 40]

Virginia Beach Borough	8,091
Lynnhaven Borough	23,731
Bayside Borough	28,045
Kempsville Borough	13,900
Princess Anne Borough	7,211
Pungo Borough	2,504
Blackwater Borough	733

Q. The figures you gave for the Bayside District or Borough was what?

A. 28,045.

Q. Mr. Newsome, I want to direct your attention to Table No. 7, page 16 of the United States Census, Population for 1960, and ask you if you are acquainted with the asterisk as shown for the revised population of the Bayside District?

A. Yes, I am aware of that.

Q. What was the actual devised population for the Bayside District?

A. The revised Bayside District was 29,048.

Q. Is that the actual count that is assigned to Bayside as the final tabulation of inhabitants?

A. That is the final United States Census figure.

Q. Have you projected a figure for these various boroughs or districts in Virginia Beach so as to reflect the figures as of the current year?

A. I have as of 1 January 1964.

Q. And would you state the basis of your projection?

A. The basis of the projection is beginning from the 1960 [fol. 41] census, from which I extrapolated by borough the 1960 population count and the 1960 count of dwelling units, coming up with the figure of the number of persons per dwelling unit in each of the boroughs.

Using this as a basis, an actual count of building permits for dwelling units was made by boroughs.

This figure was multiplied by the number of persons per dwelling unit, and added on to the 1960 census figure.

Q. Would you relate the population in the respective boroughs as of January 1, 1964 as arrived at by yourself?

A. Yes, sir.

Virginia Beach Borough	10,473
Lynnhaven Borough	37,760
Bayside Borough	36,027
Kempsville Borough	22,254.
Princess Anne Borough	7,957
Pungo Borough	2,806
Blackwater Borough	862

[fol. 42] IVAN DOUGHTY MAPP, witness first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

Direct examination.

Examined by Mr. Howell:

Q. State your full name and the position that you hold with the City of Virginia Beach.

A. Ivan Doughty Mapp, Commissioner of Revenue of the City of Virginia Beach.

Q. Mr. Mapp, referring to Blackwater District, what is the value of real property in Blackwater District that was assessed by your office?

[fol. 43] A: \$1,381,008, Blackwater Borough.

Q. I notice on the opposite page of the particular record that you have brought from your office, it shows it is headed

up, "Distribution by Districts of Values and County and District Levies," and it has a value figure total, \$829,540.

What is that value? What does that value figure reflect?

A. It looks like it is the total land and building assessments, and of course, I don't think this includes the colored.

These figures over here are the totals. I think I gave you a little incorrect figure.

It is \$1,381,908, the total. That is white and colored.

Mr. Howell: Let me see it, please.

(Mr. Mapp hands paper to Mr. Howell.)

At this point, we are going to identify and offer in evidence this compilation by districts and distribution by districts of the real property assessments with the understanding that if the Planning Commission, which has a process for photostating large maps, if they cannot reproduce this for the office of the Commissioner of Revenue that we will take it in to Butler Blueprint and have it reproduced, and the original will be returned to the Commissioner's office; or if the Commissioner does not want to transport that through myself, then one of his deputies could take it to Butler and stay with it until he brings it back.

Q. And we ask for Mr. Mapp to identify what the page, which I will designate as "Page 1 for identification," what does page 1 attempt to reflect?

A. It is the distribution by districts of the values of county and district levies.

They were used when we were accounted and we are still using them to save money.

Q. And you have adapted the particular column captions by typing in the titles appropriate to the City of Virginia Beach?

A. That is right.

Q. What does page #2 reflect?

A. This is the general recapitulation of values of tracts of lands and lots not incorporated in towns, and standing

[fol. 44] timber trees, mineral lands, minerals, buildings, and improvements; and county and district levies assessed thereto for the tax year 1964.

That is the new assessment.

Mr. Howell; We offer, subject to the objection of the Defendants, we offer this as "Petitioner's Exhibit #2," and ask that it be so marked at this time.

Q. Mr. Mapp, I notice that on page #1 of "Petitioner's Exhibit #2," it does have land slots for white and land slots and so forth for colored, and they represent a total of \$829,540, as compared with the figure of \$1,381,000 odd dollars, as shown on the summary of page #2 of "Petitioner's Exhibit #1."

Just so we won't have this small gap unanswered for Court purposes, I wonder if you can possibly account for that?

A. No, sir, I cannot. I haven't gone over it with the people in the office who made *ths*. I am sure they have a reason for it.

Q. Referring to page #1 of "Petitioner's Exhibit #2," does this constitute assessed value?

A. Yes, sir.

Q. On which tax rate is based?

A. Yes, sir.

Q. Is the tax rate for real property the same in each one of the districts?

A. No, sir, not in all rates are the tax rates the same. Some of the rates are the same.

Q. Would you take the districts by name, starting as they are on page #1, and tell us the rate and if there is a difference, the reason for the difference?

A. Well, the general fund rate—

Q. Take it district by district if you will, and tell us the tax.

A. Blackwater general fund rate is 44¢. The school operating fund gets 85¢. The general city gets 16¢, and the school six borough gets 30¢.

Q. Explain the six borough debt.

A. That is bond issues that were floated for the whole city, citywide.

[fol. 45] Q. All lands are assessed at the same rate?

A. Yes. The assessment is equal in all boroughs.

Q. The assessment is on what basis?

A. 36% of 90.

Q. 36% of the fair market value?

A. 36% of the 90%, fair market value.

Q. I notice in some of the districts we have Bayside, and then we have Bayside MOS, and I understand that stands for Mosquito district?

A. Yes, sir.

Q. Will you give us the details?

A. There are certain areas in Bayside the people have not requested for mosquito control, and those people, of course, are not assessed with the extra cost of mosquito control.

Certain people in certain areas have requested mosquito control, so we put those in mosquito control areas.

Q. Do I gather that the people that are in the mosquito area, are they people living in Bayside, do they get in the mosquito area unless they write and request to get out?

A. Petition the Council.

Q. Do they petition to get in or get out?

A. To get in.

[fol. 46] Q. And when we say a total?

A. Here's the rate, a 10¢ levy.

Q. And they pay 10¢ more than those people who are not in the mosquito district?

A. Yes, sir.

Q. I don't want to unduly clutter the record. I will just take Bayside Mosquito District, on page #1 of "Petitioner's Exhibit #2," and we see that the value of the land is \$45,072,440, is that right, sir?

A. That is right.

Q. What does that represent? Is that the fair market value of that land?

A. 36% of 90%, lands and buildings.

Q. And these various columns, such as general debt?

A. That is how much money that brings in, that 44¢ rate.

Q. That brings in \$198,318.74 which the citizens in Bayside Mosquito District contribute to the general debt?

A. Yes, sir.

Q. And then the next column, city operation, \$383,000?

A. City schools.

Q. They contribute \$383,115.74 of actual monies to the city schools?

A. Yes, sir.

Q. And the next column is general city debt. They contribute, that particular Bayside Mosquito District contributes \$72,115.90?

A. Yes, sir.

Q. And the six borough school debt, they contribute \$135,217.32?

And then the next column is total county levies. That, I assume, is a total of these first four columns?

A. Yes, sir.

Q. And that is \$788,767.70 that was collected from this particular Bayside Mosquito District, is that right?

A. Yes, sir. There is mosquito control and there are two special assessments of 20¢ each.

Mr. Dodd can tell you what it is.

Q. I see.

A. One is 25, one 35.

Q. In addition to this sum of \$788,767, they paid \$45,072.44?

[fol. 47] A. Yes, sir.

Q. And there are special assessments shown at the rate of 25¢ and 35¢?

A. Yes, sir. That is a tax rate of \$2.10.

Q. And in the last column, we pick up the total tax rate for special as well as regular assessments, and for Blackwater it is \$1.90.

Bayside is how much? Bayside.

A. \$2.00.

Q. Bayside Mosquito District?

A. \$2.10.

Q. Kempsville?

A. \$2.00.

Q. Kempsville Mosquito District?

A. \$2.10.

Q. Lynnhaven?

A. \$2.00.

Q. Lynnhaven Mosquito?

A. \$2.10.

Q. And this Norfolk-Virginia Beach Sanitary?

A. \$2.20.

Q. Where would we find the Virginia Beach?

A. I guess that is over at the office.

Q. Do you think you could have someone get that for you?

A. Yes, sir. I will make a phone call. Excuse me.

(Witness leaves courtroom and returns in 5 minutes.)

Q. All right, sir, you now have?

A. Virginia Beach Borough, Pango and Princess Anne Borough.

Q. Princess Anne Borough has a portion in the Mosquito District and a portion out of the Mosquito District, doesn't it?

A. Yes, sir.

Q. The portion without the Mosquito District has a portion of \$1.80 levy. That is the lowest in the whole city?

A. It appears to be.

Q. Do you know why that is the lowest?

A. Because, I imagine, it doesn't have any old debts. They paid out their old debts, probably.

Q. Blackwater has some old debts?
[fol. 48] A. No, sir, evidently not.

Q. Blackwater doesn't have any old debts?

A. They have a couple of special rates here. 15¢ here and Princess Anne only has a 5¢ rate.

Q. You don't know what those rates are?

A. No, sir. Mr. Dodd knows.

Mr. Howell: We now offer into evidence as "Petitioner's Exhibit #3" the continuation of the Assessment Sheets, which will reflect the monies collected from Princess Anne and Princess Anne Mosquito District, Pungo and Virginia Beach, and ask that it be marked now as "Petitioner's Exhibit #3." (So marked.)

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[fol. 49]. GILES GLASS DODD, witness first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

Direct examination.

.

Q. Mr. Dodd, state your full name and the position you hold with the City of Virginia Beach.

A. My name is Giles Glass Dodd, and I am Director of Finance of the City of Virginia Beach.

.

[fol. 50] A. You want me to give you what the tax levy will produce in each of these boroughs?

Q. Yes.

A. This is the real estate in Blackwater Borough. We anticipate \$15,761.26.

Bayside	\$24,328.80
Bayside Mosquito	946,521.24
Kempsville	70,964.40
Kempsville Mos.	636,164.10

Lynnhaven	85,400.40
Lynnhaven Mosquito	1,156,616.16
North Va. Beach	229,414.46
Princess Anne	98,017.20
Princess Anne Mos.	16,933.18
Pungo	47,460.60
Virginia Beach	817,440.70

Q. Do you have a Virginia Beach special?

A. This was the tax in the Virginia Beach Borough.

Q. For the record, so that the record will be complete, Mr. Dodd, we see on page #1 of "Petitioner's Exhibit #2" a column headed up, "Special," and they have a rate of 15¢ for Blackwater.

Do you know what that particular levy is for?
[fol. 51] A. Yes, sir. That levy is to make a contribution to the Volunteer Fire Department.

Q. All right, sir, and then in Bayside we have a special levy of 25¢. What is the purpose of this?

A. That includes several things. It includes the contribution to the Volunteer Fire Department in Bayside. It is for garbage service, and it pays the OAS employer's cost, Old Age and Survivor's Insurance costs for the sanitary employees.

Q. And Bayside Mosquito, we find the same rate for the same purpose?

A. Yes, sir.

Q. And wherever we see 25¢ in this special column, it is for the same purpose?

A. That is correct.

Q. North Virginia Beach appears to be the only borough that has a special levy of 10¢, and this is 10¢ per what? Per \$100.00? What is that 10¢ based on?

A. That is correct.

Q. 10¢ per \$100.00?

A. Yes, sir, for sanitation.

Q. Explain that to us.

A. Sanitary, is that what you are looking at?

Q. North Virginia Beach, under sanitation that is 10¢.

A. That is for the payment of principle and interest on some debt which existed under the old county there, the sanitary debt.

Q. Now, I notice that Princess Anne Borough has a 5¢ levy for special. What is that special levy?

A. That is for a contribution to the Volunteer Fire Department, and they have some garbage removal.

Q. How do they get it for a nickel and it costs Blackwater 15¢.

A. Mr. Howell, I assume that their assessments are high enough so that the rate need not be any higher than 5¢.

Q. I thought the assessments were uniform?

A. The assessments are, but the rates are not.

Q. What is the rate for Blackwater?

A. The rate for Blackwater for this same purpose, well, not for the same purpose,—

Q. What is the rate on there?

A. \$1.90.

[fol. 52] Q. And for Princess Anne, it is what?

A. \$1.80.

Q. Take a look, if you will.

You see that the rate for total county levies for Blackwater, as shown, is \$1.75, and for Princess Anne it is shown as \$1.75.

Blackwater's total levies increase to \$1.90 because they have a 15¢ per \$100.00 special assessment for Volunteer Fire Department?

A. That is right.

Q. Princess Anne's increase is a nickel for the Volunteer Fire Department, so naturally, adding a nickel to the \$1.75 would get \$1.80, and adding 15¢ to the \$1.75 will get \$1.90.

A. The point I am making over here in Blackwater, you have the assessed value of \$829,000, and in Princess Anne you have assessed \$5,483,900.

So, if you take your cost in Blackwater—

Q. You mean the smaller the land area, the more will be the rate for Volunteer Fire Services, and vice versa?

A. All other things being equal, yes.

Q. And Blackwater, I don't quite understand this, Mr. Dodd, Blackwater has 31 square miles of area, according to the land use map prepared by the Virginia Beach Planning Commission, and that land is valued at, or its assessed valuation is \$829,540.

Princess Anne has 61 square miles, and apparently it has an assessed valuation of \$5,483,900. Is that right?

A. Yes.

Q. These columns don't include pennies; rounded off to dollars?

A. That is right.

Q. Can you account for Princess Anne having five times the assessed valuation of Blackwater if the lands are all assessed at the same rate and they only have twice as much land area?

A. Mr. Howell, I don't know how these assessors go about assessing these lands, but I would assume you would have different values depending on the usage of the land.

Q. All right, sir.

I notice that the people living within the Kempsville Mosquito Control District, they have an assessed land of \$30,000,000, and they pay 25¢ for the Volunteer Fire Department and garbage collection.

[fol. 53] Do you know why they have to pay so much more than Princess Anne? Princess Anne only pays a nickel which includes Volunteer Fire Service and some garbage service.

I followed you when you said what you said about Blackwater, but do you know why there is so much difference between Bayside and Princess Anne?

A. There again, I would have to assume that in Kempsville, I don't imagine that your density of population is much greater, and a larger percentage of your costs would be expended in Kempsville than it would be in Princess Anne.

Q. And the same thing for Bayside and Lynnhaven?

A. Yes, sir.

Q. This Virginia Beach Borough, it has \$1.48 special rate. Do you know what portion of that goes for fire service?

A. No, sir, I couldn't tell you, but they have, in addition to fire service and garbage collection, they have some debt that is retired at \$1.48. It was a debt for the old City of Virginia Beach before the merger.

Q. They have two. They have 7¢ rate for mosquito control, and \$1.48 for a number of factors, including fire, garbage, and debt retirement of a preexisting debt?

A. That is right.

Q. Now, do you have any way of knowing how much revenue you get from personal property taxes in the various districts?

A. No, sir.

[fol. 54] SIDNEY S. KELLAM, called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Examined by Mr. Frazier:

Q. Would you please state your name, your residence and your occupation?

A. My name is Sidney S. Kellam. I live at 510 Cavalier Drive, Virginia Beach. My occupation is insurance.

[fol. 55] Q. Mr. Kellam, have you lived in Virginia Beach or Princess Anne County all your life?

A. All my life.

Q. Did you occupy any position in connection with a Study Committee appointed to explore the matter of merger of the City of Virginia Beach and Princess Anne County?

A. Yes, I did. I was co-chairman of that committee.

[fol. 56] Cross examination.

By Mr. Howell:

Q. Mr. Kellam, the principal motivating factor for this committee being formed in 1961 was to protect Princess Anne County from further annexations by the City of Norfolk, is that a fair statement?

A. Well, that was the immediate—probably the rush for the committee being formed; but on a long-range program that was not the—not all of the reasoning. Virginia Beach was a very small city at that time. It had to expand and it had to go out into Princess Anne County. Bayside District was larger than practically any city in the State of Virginia with the exception of about the first 10 or 12. So was Lynnhaven District; and so was Kempsville District. And so we thought it would be far better, we would have a more simplified government and a more economical government if they were united.

Q. But you would not have done it so quickly if it hadn't been—

A. Well, it was probably under the gun of the annexation that maybe brought it to the head, that maybe might have been six months later.

[fol. 57] Q. You said that one of the considerations of this committee was to give the people in each area the rights they should have. That was your phrase?

A. Yes.

Q. What rights do you think the people in Bayside should have, for example?

A. Well, I think, by and large, the people in Bayside should have the rights to govern their borough so long as those things which they desire and need do not take away from you or place a burden on someone living in another borough. And being half urban and half rural, they were the things that we had to consider.

Q. Was there anything half rural and half urban about—you mean all of these three major boroughs?

A. No, sir. I am talking about the County of Princess Anne.

Q. The County of Princess Anne?

A. Yes, sir.

Q. Kempsville is primarily an urban borough, isn't it?

A. Well, no, Kemp—yes, urban, yes. So is Bayside. So is Lynnhaven.

Q. Those three are primarily of an urban nature?

A. That is right.

Q. Now, when you say you felt that the people of Bayville should have a right to govern their own borough, do they have an intraborough council that they sit on and carry out governmental functions just for Bayville under this present charter?

A. Bayside.

Q. Bayside.

[fol. 58] A. Oh, no. They have an elected member of the council from the borough and he is elected by the people of Bayside Borough.

Q. So there is only one council and that is the Council of the City of Virginia Beach?

A. That is right.

Q. And the only thing that the people of the Borough of Bayside can get is that which the majority of the Council of the City of Virginia Beach deems best for the City of Virginia Beach and the Borough of Bayside?

A. That is right. But the representative from the Borough of Bayside knows better what the needs of his borough is; and so long as they do not conflict with the borough of another—such as Lynnhaven—there would be no reason why they shouldn't have it.

Q. Now, let's detail as finitely as possible what the committee felt were the rights that the citizens in the various boroughs should have. You said that the motivating purpose was to give the people in each area the rights they should

have. I want to make sure that we know just what those rights were that you all were trying to give to the people.

A. Well, Mr. Howell, as I have just mentioned, Bayside Borough, as an example, has a garbage collection because it is an urban area. Pungo Borough does not have it. The people of Bayside Borough pay for it and pay for it themselves. It does not cost the citizens of Pungo Borough one penny. And they were the things that—if the people in the Bayside Borough wanted them and needed them for good, sensible living, then they should have it.

Q. All right. So that is the rights you are talking about?

A. That is the rights we are talking about.

Q. In other words, the right for Bayside if they want garbage service, to pay for it without requiring it to be a responsibility of the City as a whole, is that right, sir?

A. That is right, sir.

Q. Well now, what were those services that you felt that the City of Virginia Beach as a whole should provide in which the tax monies of the people of Bayside should help to support the entire city?

A. Well, that—as an example, they have a uniform tax for schools. They have a uniform tax for county government such as the courts, officials, police protection.

[fol. 59] Q. All right, sir. I suppose you realized when you were forming this that the total taxation that would be realized from real estate in all of Virginia Beach was roughly \$4,145,000.00? Did your committee have any idea of how much in taxes would be raised from the real estate of the various citizens?

A. Well, of course, we couldn't know what the Council may levy in the way of a tax rate at some other year.

Q. Well, it has changed since January 1, 1963, has it?

A. I don't think so, no, sir.

Q. So you all did know when you were working on this thing in '61 that probably there would be about \$4,000,000.00 raised from real estate taxes?

A. You are probably correct.

Q. And did you all know that of that \$4,000,000.00 that \$3,149,000.00 would come from these three urban areas of Bayside, Kempsville and Lynnhaven?

A. Well, they were coming from it before we had this merger.

Q. I understand that.

A. We made no change in that.

Q. Did you likewise realize that as of January 1, 1960, these three urban districts of Bayside, Kempsville and Lynnhaven had roughly 78 percent of the total population of the City of Virginia Beach?

A. Yes, sir, we realized it and that was one of the reasons for which we wanted to have a merger.

[fol. 60] Q. The Pungo man could vote to—that is primarily a rural area, isn't it?

A. That is right.

Q. Mostly farms in Pungo. He could vote a 10 percent [fol. 61] sales tax on restaurants and hotels and there wouldn't be a thing in the world that the voter in Bayside could do about it when the Pungo man came up for re-election the next time?

A. Well, that is true in any city that has ward districts, isn't it?

Q. But you are rather conversant with the code. You know that the code requires that there be approximately an equal number of inhabitants within each ward?

Q. Mr. Kellam, are you familiar with the fact that the Code of the State of Virginia requires—

A. If you say so I am sure it is correct.

[fol. 62]

CONSOLIDATION AGREEMENT FOR THE CITY OF VIRGINIA BEACH AND PRINCESS ANNE COUNTY, VIRGINIA

THIS CONSOLIDATION AGREEMENT is made in several counterparts this 10th day of November, 1961, by and between the governing bodies of the CITY OF VIRGINIA BEACH, a municipal corporation of the Commonwealth of Virginia, and PRINCESS ANNE COUNTY, a county in the Commonwealth of Virginia. The governing bodies of the city and the county hereby declare that it is in the best interest of the city and the county to consolidate into a city pursuant to Article 4, Chapter 9, Title 15 of the Code of Virginia of 1950, as amended, and in order to effect such consolidation the governing bodies of the city and the county hereby agree as follows:

I. NAMES OF CITY AND COUNTY PROPOSING TO CONSOLIDATE

The names of the city and county proposing to consolidate are City of Virginia Beach and Princess Anne County.

II. NAME OF CONSOLIDATED CITY

The name of the city into which it is proposed to consolidate is City of Virginia Beach.

III. PROPERTY AND VALUE

The property, real and personal, belonging to the City of Virginia Beach and Princess Anne County and the fair value thereof in current money of the United States is as follows:

[fol. 63]

	<i>City of Virginia Beach</i>	<i>Princess Anne County</i>
Real Estate	\$2,719,590	\$20,522,046
Personal Property	3,168,550	1,740,450
Total	<u>\$5,888,140</u>	<u>\$22,262,496</u>

IV. INDEBTEDNESS OF UNITS

The indebtedness, bonded and otherwise, of the City of Virginia Beach and Princess Anne County is as follows:

	<i>City of Virginia Beach</i>	<i>Princess Anne County</i>
General Bonded Debt	\$3,053,000.00	\$7,413,924.80
North Virginia Beach Sanitary District	—	34,000.00
Kempsville and Bayside Magisterial Districts	—	443,562.00
Pungo Magisterial District	—	48,000.00
Total	<u>\$3,053,000.00</u>	<u>\$7,939,486.80</u>

(Figures do not include interest in future years.)

V. SOURCE OF VALUATIONS AND DEBTS

The above valuations were established by the City of Virginia Beach for property and indebtedness of the city and by Princess Anne County for property and indebtedness of the county, and such valuations are accepted by the city and county solely for the purposes of this agreement.

VI. EFFECTIVE DATE

Subject to the outcome of the referendum provided for in paragraph VII hereof and subject to approval by the General Assembly of Virginia of an amended charter for the City of Virginia Beach as hereinafter provided, the consolidation shall become effective on January 1, 1963.

VII. REFERENDUM

1. As soon as practicable following the execution hereof, the governing bodies of the City of Virginia Beach and Princess Anne County shall file with one of the judges of the Circuit Court of Princess Anne County the original of this consolidation agreement, together with a petition on behalf of such governing bodies, signed by the chairman and clerk of each such bodies, asking that a referendum on the question of the consolidation herein provided for be ordered to be held at a special election within the city and the county pursuant to Article 4, Chapter 9, of Title 15 of the Code of Virginia of 1950, as amended, on January 4, 1962, or on such other date as may be fixed by the Court. Thereafter, the governing bodies of the city and county shall cause a copy of this consolidation agreement to be printed at least once a week for four successive weeks in some newspaper having a general circulation in the city and county.

2. If this consolidation receives an affirmative vote by a majority of the qualified voters voting in the referendum in the City of Virginia Beach and a majority of the qualified voters voting in the referendum in Princess Anne County, then the governing bodies of the City of Virginia Beach and Princess Anne County shall submit an amended charter for the City of Virginia Beach in substantially the [fol. 65] form annexed hereto to the 1962 session of the General Assembly of Virginia and shall urge its adoption. Such governing bodies shall have authority to agree to such revisions in the charter that may be proposed by the General Assembly.

VIII. DISPOSITION OF PROPERTY AND ASSUMPTION OF DEBTS

1. Upon the effective date of consolidation all property, real and personal, of Princess Anne County, including any sanitary districts therein, shall become the property of the City of Virginia Beach, and any and all indebtedness and other obligations of the county, including all magisterial and sanitary districts therein, shall be assumed by the City of Virginia Beach.

2. The areas comprising the City of Virginia Beach, Princess Anne County, North Virginia Beach Sanitary District, and Bayside, Kempsville and Pungo Magisterial Districts on the effective date of consolidation shall be continued in effect as special taxing districts for a period of not more than 20 years for the purpose of repaying any indebtedness chargeable to such areas. The council of the consolidated City of Virginia Beach shall levy a special tax on real property within such districts in such amount as may be necessary to repay such indebtedness, to the end that all indebtedness existing on the effective date of consolidation shall be repaid by the area creating the indebtedness.

3. From the date of this agreement until the effective date of consolidation neither the present City of Virginia [Vol. 66] Beach nor Princess Anne County, or any magisterial or sanitary district therein, shall issue any bonds which shall not mature on or before 20 years after the effective date of consolidation, unless the issuance of such bonds shall have been approved by the Council of the present City of Virginia Beach and by the Board of Supervisors of Princess Anne County.

IX. BOROUGHES AND ELECTIONS

1. The present City of Virginia Beach and the six present magisterial districts of Princess Anne County shall become boroughs of the consolidated City of Virginia

Beach which shall be known by the following names, i.e., Virginia Beach, Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo, respectively.

2. The council shall consist of eleven members, five to be elected from the borough of Virginia Beach and one from each of the other six boroughs. At such time as may be determined by the affirmative vote of seven councilmen, which shall not be earlier than five years after the effective date of consolidation but not later than September 1, 1971, the council shall submit to the qualified voters of the city a new plan for election of councilmen.

3. The initial council shall consist of the five members of the council of the City of Virginia Beach and the six members of the Board of Supervisors of Princess Anne County in office on the effective date of consolidation who shall hold office until the beginning of the terms of their successors. Councilmen in each borough shall be elected in [fol. 67] the same manner and for the same terms as councilmen or supervisors were elected in such borough immediately preceding the effective date of consolidation; provided, however, that the three councilmen of the present City of Virginia Beach elected in June 1962 shall serve until September 1, 1967. Two councilmen from the Borough of Virginia Beach shall be elected in June 1964 and shall serve until September 1, 1967. All other councilmen shall be elected in June 1963 and shall serve until September 1, 1967. Beginning in 1967 all councilmen shall be elected on the second Tuesday in June for terms of four years and shall take office on the first day of September following their election.

X. CONSTITUTIONAL OFFICERS

1. Upon the effective date of consolidation the constitutional officers of the city and the county shall continue in office for the full terms to which they were elected.

2. The sheriff of Princess Anne County and the present City of Virginia Beach shall continue to perform the same duties during the remainder of the term to which he was elected. From and after January 1, 1964, the consolidated City of Virginia Beach shall have a sergeant who shall be elected in lieu of a sheriff. No election shall be held in the present City of Virginia Beach to elect a sergeant for the term beginning January 1, 1963, but the sergeant of the present City of Virginia Beach shall become the high constable of the consolidated City of Virginia Beach and shall serve at the pleasure of the council. He shall perform such [fol. 68] of the duties now performed by the sergeant of the present City of Virginia Beach and such other duties as the council may prescribe.

3. The treasurer and the commissioner of revenue for the consolidated city shall be determined by agreement between those persons holding such respective offices. In the event that no agreement is reached before the effective date of consolidation, the Circuit Court of Princess Anne County shall designate one officer as principal and the other as deputy.

4. The salaries of the constitutional officers shall not be diminished during the remainder of the terms to which they were elected.

XI. MUNICIPAL SEAT OF GOVERNMENT

The municipal seat of government shall be located at the present county seat of Princess Anne. Offices for municipal services shall be maintained at the city hall in the present City of Virginia Beach for the convenience of citizens.

XII. HIGHER TAXES FOR ADDITIONAL SERVICES

The council of the City of Virginia Beach shall have power to levy a higher tax in such areas of the city as de-

sire additional or more complete services of government than are desired in the city as a whole, provided that such higher tax rate shall not be levied for school, police or general government services but only for those services which prior to consolidation were not offered in the whole of the city and the county. The proceeds of such tax shall be segregated and expended in the areas in which collected.

XIII. PREPARATION OF 1962-63 BUDGETS

1. The city and the county shall prepare and adopt separate budgets for the fiscal year July 1, 1962-June 30, 1963, in accordance with present practices on the assumption that each would operate independently for the entire fiscal year. Before January 1, 1963, the city and county budgets shall be consolidated into a single budget under which the consolidated City of Virginia Beach shall operate from January 1 through June 30, 1963.

2. All funds from the issue of bonds by the city or the county, the use of which is restricted by the terms thereof, shall be set aside in a special fund for disposition in accordance with such requirements.

XIV. PERSONNEL PAY AND RETIREMENT BENEFITS

1. In order to carry on an efficient administration, the City of Virginia Beach will need the experience and skills of the employees of both the city and the county. Therefore, it is agreed that the city will adhere to the principle that all employees of the two governmental units will be retained and will be compensated at no lower rate of pay than they received at the effective date of consolidation and that they will occupy positions as comparable as practicable to those occupied at the time of consolidation.

2. The obligation of the present City of Virginia Beach under its existing pension plan for the police and fire de-

[fol. 70] partments on the effective date of consolidation shall become the indebtedness and obligation of the consolidated City of Virginia Beach. The consolidation agreement shall be deemed an agreement between the consolidated City of Virginia Beach and the employees and retired employees having vested rights covered by such pension plan on the date of consolidation to the end that the rights and equities of employees and retired employees under such pension plan shall not be diminished, curtailed or impaired in any way. From and after the effective date of consolidation such pension plan shall be continued in effect for the exclusive benefit of such employees and retired employees having vested rights thereunder and for no others.

3. All other employees and retired employees of the present City of Virginia Beach and all employees and retired employees of Princess Anne County having vested rights under any retirement plan of the city or county on the effective date of consolidation shall continue to be covered by such plan. The consolidation agreement shall be deemed an agreement between the consolidated city of Virginia Beach and such employees and retired employees that in the event that the consolidated City of Virginia Beach shall combine, consolidate or amend any such retirement plan, such action shall not in any way diminish, curtail or impair the vested rights of any such employees or retired employees.

XV. SCHOOLS

For the safety and welfare of the school children the school board of the City of Virginia Beach shall continue [fol. 71] substantially the school bus service formerly maintained in Princess Anne County, unless in the opinion of the school board, considering various factors including increased density of population, availability of school facilities, changes in traffic patterns and availability of public

transportation, such services or any part thereof should be altered or discontinued.

IN WITNESS WHEREOF, the Council of the City of Virginia Beach and the Board of Supervisors of Princess Anne County have entered into this consolidation agreement and the city and county have caused this consolidation agreement to be executed in their respective names and their respective seals to be hereunto affixed and attested by their respective officers thereunto duly authorized.

CITY OF VIRGINIA BEACH

By _____
Mayor

Attest:

Clerk

PRINCESS ANNE COUNTY

By _____
Chairman
Board of Supervisors

Attest:

Clerk

[fol. 72]

CHAPTER 147

An Act to effectuate the consolidation of Princess Anne County and the city of Virginia Beach, a city of the second class, into the city of Virginia Beach, a city of the first class; and to this end to validate, ratify and confirm the consolidation agreement between Princess Anne County and the city of Virginia Beach; to provide

a charter for the new city of Virginia Beach, and to repeal Chapter 33 of the Acts of Assembly of 1952, approved February 14, 1952, which incorporated the city of Virginia Beach, and all amendments thereto.

[H 107]

Approved February 28, 1962

Be it enacted by the General Assembly of Virginia:

1. The consolidation of the city of Virginia Beach and Princess Anne County into the consolidated city of Virginia Beach, a city of the first class, as provided in the consolidation agreement to which reference is hereby made and which is made part hereof, is hereby validated, ratified and confirmed in all respects and such consolidation shall be effective on and after January one, nineteen hundred sixty-three.

2. Chapter 33 of the Acts of Assembly of 1952 and all amendments thereto, which is entitled "An act to incorporate the city of Virginia Beach; and to repeal Chapter 76 of the Acts of Assembly 1906, approved March 6, 1906, which incorporated the town of Virginia Beach, and all amendments thereto", approved February 14, 1952, is repealed as of the first moment of January one, nineteen hundred sixty-three.

3. Be it further enacted by the General Assembly of Virginia:

Chapter 1

INCORPORATION AND BOUNDARIES

§ 1.01. INCORPORATION. The inhabitants of the territory comprised within the limits of the City of Virginia Beach, as they are or hereafter may be established by law, shall continue to be a body politic and corporate under the name of the City of Virginia Beach and as such shall have perpetual succession, may sue and be sued, contract and be contracted with and may have a corporate seal which

it may alter at its pleasure. The inhabitants of the territory comprised within the limits of Princess Anne County as it exists at the effective date of this charter shall also be a part of such body politic and corporate.

§ 1.02. BOUNDARIES. The boundaries of the City of Virginia Beach shall coincide with the outside boundaries of Princess Anne County so as to include all of the territory comprising Princess Anne County and the City of Virginia Beach as existing immediately preceding the effective date of this charter.

Chapter 2

POWERS

§ 2.01. GENERAL GRANT OF POWERS. The powers set forth in §§ 15-77.1 through 15-77.70 of the Code of Virginia as in force on January 1, 1962, are hereby conferred on and vested in the City of Virginia Beach.

§ 2.02. ADDITIONAL POWERS. Without limiting the generality of the foregoing, but in addition thereto, the City of Virginia Beach shall have the following additional powers:

(a) To spend not exceeding five per cent of its annual revenue from all sources in advertisement of and giving publicity to its resources and advantages.

(b) To levy a higher tax in such areas of the City of [fol. 73] Virginia Beach as desire additional or more complete services of government than are desired in the city as a whole, provided that such higher tax rate shall not be levied for school, police or general government services but only for those services which prior to the effective date of this charter were not offered in all the territory within the boundaries of the city and provided further that the proceeds from such higher tax rate shall be so segregated as to enable the same to be expended in the areas in which raised.

(c) To levy a special tax on real property in any borough, sanitary district or other special taxing district or combination thereof, for a period of not exceeding 20 years, which may be different from and in addition to the general tax rate throughout the city, for the purpose of repaying indebtedness existing on the effective date of this charter and chargeable to such borough, sanitary district or other special taxing district or combination thereof.

(d) To exercise all powers possessed by the City of Virginia Beach and Princess Anne County immediately preceding the effective date of this charter, consistent with general law and not inconsistent with this charter; provided, however, that except as otherwise specifically provided in this charter, all laws heretofore applicable to Virginia Beach or Princess Anne County, respectively, shall continue to apply to the areas theretofore comprising such political subdivisions, now incorporated under this charter as a single such subdivision, until otherwise provided by law.

Chapter 3

CITY COUNCIL

§ 3.01. COMPOSITION. The city shall be divided into seven boroughs. One of such boroughs shall comprise the City of Virginia Beach as existing immediately preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the remaining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, five of whom shall be elected by and from the borough of Virginia Beach and one by and from each of the other six boroughs. The five members of the council of the City of Virginia Beach and the six members of the Board of Supervisors of Prin-

cess Anne County holding office immediately preceding the effective date of this charter shall constitute the council of the city and shall hold office until the beginning of the terms of their successors. At such time as may be determined by the affirmative vote of seven councilmen, which shall not be earlier than five years after the effective date of this charter but not later than September 1, 1971, the council shall submit to the qualified voters of the city a new plan for election of councilmen.

§ 3.02. ELECTION OF COUNCILMEN. Councilmen in each borough shall be elected in the same manner and for the same terms as councilmen or supervisors were elected in such borough immediately preceding the effective date of this charter; provided, however, that the three councilmen of the present City of Virginia Beach elected in June 1962 shall serve until September 1, 1967. Two councilmen from the borough of Virginia Beach shall be elected in June 1964 and shall serve until September 1, 1967. All other councilmen shall be elected in June 1963, and shall serve until September 1, 1967. Beginning in 1967 all councilmen shall be elected on the second Tuesday in June for terms of four years and shall take office on the first day of September following their election.

§ 3.03. FILLING VACANCIES. Vacancies in the office of councilmen, from whatever cause arising, shall be filled within 60 days for the unexpired portion of the term by a majority vote of the remaining members of the council, [fol. 74] provided that so long as any councilmen are elected by and from wards or boroughs the vacancy shall be filled by a qualified voter residing in the same ward or borough.

§ 3.04. COMPENSATION. Councilmen shall receive as compensation for their services such amounts as the council may determine, not to exceed \$200 per month for councilmen and \$250 per month for the mayor. No member of the council shall be appointed to any office of profit under the city government during the term for which elected and for one year thereafter.

§ 3.05. **POWERS.** All powers vested in the city shall be exercised by the council except as otherwise provided in this charter. In addition to the foregoing, the council shall have the following powers:

(a) To provide for the organization, conduct and operation of all departments, bureaus, divisions, boards, commissions, offices and agencies of the city.

(b) To create, alter or abolish departments, bureaus, divisions, boards, commissions, offices and agencies other than those specifically established by this charter.

(c) To create, alter or abolish and to assign and re-assign to departments, all bureaus, divisions, offices and agencies except where such bureaus, divisions, offices or agencies are specifically assigned by this charter.

(d) To provide for the number, titles, qualifications, powers, duties and compensation of all officers and employees of the city.

(e) To provide for the form of oaths and the amount and condition of surety bonds to be required of certain officers and employees of the City.

(f) To provide for the submission of any proposed ordinance to the qualified voters of the city at an advisory referendum to be initiated by a resolution to the circuit court of the city and held not less than 30 nor more than 60 days thereafter in the manner provided by law for general elections.

§ 3.06. **PROCEDURAL POWERS.** The council shall have power, subject to the provisions of this charter, to adopt its own rules of procedure. Such rules shall provide for the time and place of holding regular meetings of the council which shall be not less frequent than once each month. They shall also provide for the calling of special meetings by the mayor or any three members of the council and shall prescribe the methods of giving notice thereof. A majority of the council shall constitute a quorum for

the transaction of business. No ordinance, resolution, motion or vote, other than motions to adjourn, to fix the time and place of adjournment and other motions of a purely procedural nature, shall be adopted by the council except at a meeting open to the public.

§ 3.07. **MAYOR.** At its first regular meeting of the term the council shall choose by majority vote of all the members thereof one of its members to be mayor and one to be vice-mayor. Until such time as the representation on the council is changed as provided in § 3.01, one of such officers shall be a councilman elected by and from the borough of Virginia Beach and the other shall be a councilman elected by and from one of the other boroughs. The mayor shall preside over the meetings of the council, shall act as head of the city government for ceremonial purposes and shall have such other rights and duties as the council may prescribe, in addition to all the rights and privileges of councilmen of the city. The vice-mayor shall perform the duties of mayor in the absence or disability of the mayor.

§ 3.08. **CITY CLERK.** The council shall appoint a city clerk who shall serve at the pleasure of the council. He shall be clerk of the council and custodian of the corporate seal of the city and he shall have such further duties as the council may prescribe.

[fol. 75]

Chapter 4

CITY MANAGER

§ 4.01. **APPOINTMENT AND QUALIFICATIONS.** The council shall appoint a city manager who shall be the executive and administrative head of the city government. He shall be chosen solely on the basis of his executive and administrative qualifications and shall serve at the pleasure of the council.

§ 4.02. **POWERS AND DUTIES.** The city manager shall have the power and it shall be his duty:

(a) To appoint all officers and employees of the city and to remove such officers and employees, except as he may delegate such power to appoint and remove to his subordinates and except as otherwise provided in this charter.

(b) To perform such other duties and to exercise such other powers as may be imposed or conferred upon him by the council.

§ 4.03. COUNCIL NOT TO INTERFERE IN APPOINTMENTS OR REMOVALS. Neither the council nor any of its members shall direct the appointment of any person to or his removal from any office or employment by the city manager or by his subordinates.

Chapter 5

BUDGET

§ 5.01. FISCAL YEAR. The fiscal year of the city shall be established by ordinance and shall also constitute the tax year and the budget and accounting year.

§ 5.02. SUBMISSION OF BUDGET. The city manager shall submit to the council a budget and a budget message at least 90 days prior to the beginning of each budget year.

§ 5.03. PREPARATION OF BUDGET. It shall be the duty of the head of each department, the judges of the courts not of record, each board or commission, including the school board, and each other office or agency supported in whole or in part by the city, to file at such time as the city manager may prescribe estimates of revenue and expenditure for that department, court, board, commission, office or agency for the ensuing fiscal year. The city manager shall hold such hearings as he may deem advisable and shall review the estimates and other data pertinent to the preparation of the budget and make such revisions in such estimates as he may deem proper, subject to the laws of the Commonwealth relating to obligatory expendi-

tures for any purpose, except that in the case of the school board he may recommend a revision only in its total estimated expenditure. The budget shall be prepared in accordance with accepted principles of municipal accounting and budgetary procedures and techniques.

§ 5.04. **BALANCED BUDGET.** In no event shall the expenditures recommended by the city manager in the budget exceed the receipts estimated, taking into account the estimated cash surplus or deficit at the end of the current fiscal year, unless the city manager shall recommend an increase in the rate of ad-valorem taxes on real estate and tangible personal property or other new or increased taxes or licenses within the power of the city to levy and collect in the ensuing fiscal year the receipts from which estimated on the basis of the average experience with the same or similar taxes during the three tax years last past, will make up the difference. If estimated receipts exceed estimated expenditures the city manager may recommend revisions in the tax and license ordinances of the city in order to bring the budget into balance.

§ 5.05. **BUDGET MESSAGE.** The budget message shall contain the recommendations of the city manager concerning the fiscal policy of the city, a description of the important features of the budget and an explanation of all [fol. 76] significant changes in the budget as to estimated receipts and recommended expenditures as compared with the current and last preceding fiscal years.

§ 5.06. **APPROPRIATION AND ADDITIONAL TAX ORDINANCES.** At the same time that he submits the budget the city manager shall introduce and recommend to the council an appropriation ordinance which shall be based on the budget. He shall also introduce at the same time any ordinances levying a new tax or altering the rate on any existing tax necessary to balance the budget as provided in § 5.04.

§ 5.07. PUBLIC HEARING. The council shall hold a public hearing on the budget as submitted, at which all interested persons shall be given an opportunity to be heard. The council shall cause to be published a notice of the time and place of the hearing not less than seven days prior to the date of the hearing.

§ 5.08. ADOPTION OF BUDGET. After the public hearing the council may make such changes in the budget as it may determine, except that no item of expenditure for debt service shall be reduced or omitted. The budget shall be adopted by the vote of at least a majority of all members of the council not later than 30 days prior to the end of the current fiscal year. Should the council take no action prior to such day, the budget shall be deemed to have been finally adopted as submitted. In no event shall the council adopt a budget in which the estimated total of expenditures exceeds receipts, unless at the same time it adopts measures to provide additional revenue estimated to be sufficient to make up the difference.

§ 5.09. ADDITIONAL APPROPRIATIONS. Appropriations in addition to those contained in the general appropriation ordinance may be made by the council only if there is available in the general fund an unencumbered and unappropriated sum sufficient to meet such appropriations.

Chapter 6

BORROWING

§ 6.01. BORROWING POWER. The council may, in the name of and for the use of the city, incur indebtedness by issuing its negotiable bonds or notes for the purposes, in the manner and to the extent provided in this chapter.

§ 6.02. PURPOSES FOR WHICH BONDS OR NOTES MAY BE ISSUED. Bonds or notes of the city may be issued for the following purposes:

(a) To finance capital projects.—Bonds, and notes in anticipation of bonds when the issue of bonds has been authorized as hereinafter provided, may be issued for the purpose of financing the whole or any part of the cost of any capital improvement project.

(b) To anticipate the collection of revenue.—Notes may be issued, when authorized by the council, at any time during the fiscal year in anticipation of the collection of revenue of such year.

(c) To refund outstanding bonds.—Bonds may be issued for the purpose of refunding existing bonds, provided that the director of finance shall certify in writing that such refunding is necessary to prevent default on the interest or principal of the city's outstanding bonds or in the case of callable bonds to secure a lower rate of interest.

§ 6.03. LIMITATIONS ON INDEBTEDNESS. In the issuance of bonds and notes the city shall be subject to the limitations as to amount contained in Section 127 of the Constitution.

§ 6.04. FORM OF BONDS. Bonds and notes of the city shall be issued in the manner provided by general law.

§ 6.05. AUTHORITY FOR ISSUANCE OF BONDS. [fol. 77] No bonds of the city shall be issued until their issuance shall have been authorized by a majority of the qualified voters of the city voting at an election held for the purpose and in the manner provided by general law; provided, however, that the council may issue bonds in an amount not exceeding \$500,000 in any calendar year or notes in anticipation of the collection of revenue without submitting the question of their issuance to the qualified voters.

§ 6.06. PAYMENT OF BONDS AND NOTES. The power and obligation of the city to pay any and all bonds and notes issued pursuant to this charter, except revenue bonds made payable solely from revenue producing

properties, shall be unlimited and the city shall levy ad valorem taxes upon all taxable property within the city for the payment of such bonds or notes and the interest thereon, without limitation as to rate or amount. The full faith and credit of the city are hereby pledged for the payment of the principal of and interest on all bonds and notes of the City of Virginia Beach and of Princess Anne County and any sanitary districts therein issued and outstanding on the effective date of this charter, and of the city hereafter issued pursuant to this chapter, except revenue bonds made payable solely from revenue producing properties, whether or not such pledge be stated in the bonds or notes or in the bond ordinance authorizing their issuance.

Chapter 7

ADMINISTRATIVE DEPARTMENTS

§ 7.01. CREATION OF DEPARTMENTS. The following administrative departments are hereby created:

- (a) Department of Finance
- (b) Department of Law
- (c) Department of Public Safety
- (d) Department of Public Works
- (e) Department of Public Utilities
- (f) Department of Public Health
- (g) Department of Public Welfare
- (h) Department of Farm and Home Demonstration
- (i) Department of Education
- (j) Department of Parks and Recreation
- (k) Department of Personnel

The council may create new departments or subdivisions thereof, combine or abolish existing departments and dis-

tribute the functions thereof or establish temporary departments for special work; provided, however, that the council shall not have the power to abolish, transfer or combine the functions of the departments of finance, law and education.

§ 7.02. DEPARTMENT HEADS. There shall be a director at the head of each department, and the same person may be the director of several departments. The director of each department, except the departments of law and education, shall be appointed by the city manager and may be removed by him at any time; provided, however, that the council may provide that the city manager shall be director of one or more departments. The director of each department shall be chosen on the basis of his general executive and administrative ability and experience and of his education, training and experience in the class of work which he is to administer.

§ 7.03. RESPONSIBLE TO CITY MANAGER. The directors of each department, except the departments of law and education, shall be immediately responsible to the city manager for the administration of their respective departments, and their advice may be required by him on all matters affecting their departments. They shall make reports and recommendations concerning their departments to the city manager under such rules and regulations as he may prescribe.

[fol. 78]

Chapter 8

FINANCIAL ADMINISTRATION

§ 8.01. DEPARTMENT OF FINANCE. The department of finance shall consist of a director of finance, a comptroller or accounting officer, the city treasurer and the commissioner of revenue and their respective offices, insofar as inclusion of these offices is not inconsistent with the Constitution and general laws of the Commonwealth of

Virginia, and such other officers and employees organized into such bureaus, divisions and other units as may be provided by the council or by the orders of the director consistent therewith.

§ 8.02. **DIRECTOR OF FINANCE.** The head of the department of finance shall be the director of finance who may also be the city manager. He shall be a person skilled in municipal accounting and financial control. He shall have charge of the financial affairs of the city, including such powers and duties as may be assigned by the council not inconsistent with the Constitution and general laws of the Commonwealth of Virginia.

§ 8.03. **CITY TREASURER.** The city treasurer shall be the custodian of all public monies of the city and shall have such powers and duties as are provided by general law. He shall perform such other duties as may be assigned by the director of finance or the council not inconsistent with the laws of the Commonwealth.

§ 8.04. **COMMISSIONER OF REVENUE.** The commissioner of revenue shall perform such duties not inconsistent with the laws of the Commonwealth in relation to the assessment of property and licenses as may be assigned by the director of finance or the council.

§ 8.05. **DIVISION OF PURCHASING.** There shall be a division of purchasing which shall be in charge of purchasing all supplies of the city. The head of the division of purchasing shall be the purchasing agent who shall have such duties as may be assigned by the council.

§ 8.06. **ANNUAL AUDIT.** The council shall cause to be made an independent audit of the city's finances at the end of each fiscal year by the auditor of public accounts of the Commonwealth or by a firm of independent certified public accountants to be selected by the council. One copy of the report of such audit shall be always available for public inspection in the office of the city clerk during regular business hours.

Chapter 9

DEPARTMENT OF LAW

§ 9.01. DEPARTMENT OF LAW. The department of law shall consist of the city attorney and such assistant city attorneys and other employees as may be provided by the council.

§ 9.02. CITY ATTORNEY. The head of the department of law shall be the city attorney. He shall be an attorney at law licensed to practice law in the Commonwealth of Virginia. He shall be appointed by the council and shall serve at its pleasure.

§ 9.03. POWERS AND DUTIES. The city attorney shall be the chief legal advisor of the council, the city manager and of all departments, boards, commissions and agencies of the city in all matters affecting the interests of the city. He shall have such powers and duties as may be assigned by the council.

§ 9.04. RESTRICTIONS ON ACTIONS FOR DAMAGES AGAINST CITY. No action shall be maintained against the city for injury or damage to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or of any officer, employee or agent thereof, unless a written statement by the claimant, his agent, attorney or representative, of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney within sixty days after such cause of action shall have accrued, [fol. 79] except that when the claimant is an infant or non compos mentis, or the injured person dies within such 60 days, such statement may be filed within 120 days. Neither the city attorney nor any other officer, employee or agent of the city shall have authority to waive the foregoing conditions precedent or any of them.

Chapter 10

DEPARTMENT OF PUBLIC SAFETY

§ 10.01. DEPARTMENT OF PUBLIC SAFETY. The department of public safety shall include the bureaus of police and fire protection and may include such other bureaus, divisions and units and have such powers and duties as may be provided or assigned by the council or by the director consistent therewith. The council may continue the Police and Trial Board as authorized for Princess Anne County by Acts of 1954, Chapter 101, as amended by Acts 1960, Chapter 44.

§ 10.02. DIRECTOR OF PUBLIC SAFETY. The head of the department of public safety shall be the director of public safety. He shall have general management and control of the several bureaus, divisions and other units of the department.

§ 10.03. BUREAU OF POLICE. The bureau of police shall consist of a chief of police, who may be the director of public safety, and such other officers and employees as may be provided by the council or by the orders of the director of public safety. The bureau of police shall be responsible for preservation of the public peace, protection of the rights of persons and property and enforcement of laws of the Commonwealth and ordinances of the city. The chief of police and the other members of the police force shall have all the powers and duties of police officers as provided by general law.

§ 10.04. BUREAU OF FIRE PROTECTION. The bureau of fire protection shall consist of the fire chief and such other officers and employees as may be provided by the council or by the orders of the director consistent therewith. The bureau of fire protection shall be responsible for the protection from fire of life and property within the city.

Chapter 11

DEPARTMENT OF PUBLIC WORKS

§ 11.01. DEPARTMENT OF PUBLIC WORKS. The department of public works shall consist of the director of public works and such other officers and employees organized into such bureaus, divisions and other units as may be provided by the council or by the orders of the director consistent therewith.

§ 11.02. FUNCTIONS. The department of public works shall be responsible for the construction and maintenance of all public buildings, streets, roads, bridges and drains, for garbage and refuse collection and disposal and for all other public works, and for the care of all public buildings. It shall also have such other powers and duties as may be assigned by the council.

§ 11.03. DIRECTOR OF PUBLIC WORKS. The head of the department of public works shall be the director of public works. He shall have general management and control of the several bureaus, divisions and other units of the department.

Chapter 12

DEPARTMENT OF PUBLIC UTILITIES

§ 12.01. DEPARTMENT OF PUBLIC UTILITIES. The department of public utilities shall consist of a director of public utilities and such other officers and employees organized into such bureaus, divisions and other units as may be provided by the council or by the orders of the director consistent therewith.

[fol. 80] § 12.02. FUNCTIONS. The department of public utilities shall be responsible for the construction, operation and maintenance of the waterworks system and the sewers and sewage disposal and such other powers and duties as may be assigned by the council.

§ 12.03. **DIRECTOR OF PUBLIC UTILITIES.** The head of the department of public utilities shall be the director of public utilities. He shall have general management and control of the several bureaus, divisions and other units of the department.

Chapter 13

DEPARTMENT OF PUBLIC HEALTH

§ 13.01. **DEPARTMENT OF PUBLIC HEALTH.** The department of public health shall consist of the director of public health and such other officers and employees organized into such bureaus, divisions and other units as may be provided by the council or by the orders of the director consistent therewith.

§ 13.02. **FUNCTIONS.** The department of public health shall be responsible for the exercise of all health functions imposed on municipalities by general law and such other powers and duties as may be assigned by the council.

§ 13.03. **DIRECTOR OF PUBLIC HEALTH.** The head of the department of public health shall be the director of public health. He shall be a physician licensed to practice medicine in the Commonwealth of Virginia. He shall have general management and control of the several bureaus, divisions and other units of the department. He shall have all the powers and duties with respect to the preservation of the public health which are conferred or imposed on municipal boards of health and health officers by the laws of the Commonwealth of Virginia.

Chapter 14

DEPARTMENT OF PUBLIC WELFARE

§ 14.01. **DEPARTMENT OF PUBLIC WELFARE.** The department of public welfare shall consist of the director of public welfare, a welfare board constituted as provided by general law and such officers and employees organized in such bureaus, divisions and other units as

may be provided by the council or by the orders of the director consistent therewith.

§ 14.02. FUNCTIONS. The department of public welfare shall be responsible for the duties imposed by the laws of the Commonwealth of Virginia relating to public assistance and relief of the poor and such other powers and duties as may be assigned by the council.

§ 14.03. DIRECTOR OF PUBLIC WELFARE. The head of the department of public welfare shall be the director of public welfare. He shall have general management and control of the several bureaus, divisions and other units of the department.

Chapter 15

DEPARTMENT OF FARM AND HOME DEMONSTRATION

§ 15.01. DEPARTMENT OF FARM AND HOME DEMONSTRATION. The department of farm and home demonstration shall consist of an agricultural agent, a home demonstration agent and such other officers and employees organized in such bureaus, divisions and other units as may be prescribed by the council or by the orders of the director consistent therewith.

§ 15.02. FUNCTIONS. The department of farm and home demonstration shall exercise all powers which are conferred upon counties relating to county farm and home demonstration work and shall have such other powers and duties as may be assigned by the council.

§ 15.03. DIRECTOR OF FARM AND HOME DEMON-
[fol. 81] STRATION. The director of the department of farm and home demonstration shall be the agricultural agent. He shall be selected from a list of eligibles submitted by the Virginia Polytechnic Institute. He shall have general management and control of the several bureaus, divisions and other units of the department.

Chapter 16

DEPARTMENT OF EDUCATION

§ 16.01. DEPARTMENT OF EDUCATION. The department of education shall consist of the city school board, the division superintendent of schools and the officers and employees thereof. Except as otherwise provided in this charter, the city school board and the division superintendent of schools shall exercise all the powers conferred and perform all the duties imposed upon them by general law.

§ 16.02. SCHOOL BOARD. For a period of three years after the effective date of consolidation the school board shall consist of all members of the school boards of the City of Virginia Beach and Princess Anne County holding office immediately preceding the effective date of this charter. Thereafter the school board shall be composed of seven members who shall be appointed by the council for terms of three years; provided, however, that in the appointment of the initial school board, two members shall be appointed for terms of one year, two for two years and three for three years. Vacancies shall be filled by the council for any unexpired term.

§ 16.03. DIVISION SUPERINTENDENT. The person holding office as division superintendent in both the City of Virginia Beach and Princess Anne County shall continue for the unexpired portion of his term.

Chapter 17

DEPARTMENT OF PARKS AND RECREATION

§ 17.01. DEPARTMENT OF PARKS AND RECREATION. The department of parks and recreation shall consist of the director of parks and recreation and such other officers and employees organized into such bureaus, divisions and other units as may be prescribed by the council or by the orders of the director consistent therewith.

§ 17.02. **FUNCTIONS.** The department of parks and recreation shall be responsible for operating and maintaining public parks, playgrounds and recreation facilities and organizing and conducting recreation programs and shall have such other powers and duties as may be assigned by the council.

§ 17.03. **DIRECTOR OF PARKS AND RECREATION.** The head of the department of parks and recreation shall be the director of parks and recreation. He shall have general management and control of the several bureaus, divisions and other units of the department.

Chapter 18

DEPARTMENT OF PERSONNEL

§ 18.01. **DEPARTMENT OF PERSONNEL.** The department of personnel shall consist of a director of personnel and such other officers and employees organized into such bureaus, divisions and other units, including a personnel board, as may be prescribed by the council or by orders of the director consistent therewith.

§ 18.02. **FUNCTIONS.** The personnel department shall be responsible for the formulation and administration of the personnel policy of the city.

§ 18.03. **DIRECTOR OF PERSONNEL.** The head of the department of personnel shall be the director of personnel. He shall have general management and control of the several bureaus, divisions and other units of the department, except as the council may assign such duties to a personnel board.

[fol. 82]

Chapter 19

CITY PLANNING

§ 19.01. **PLANNING COMMISSION.** There shall be a city planning commission which shall consist of not less than five nor more than fifteen members, and shall be organized as provided by general law. All members of the

commission shall be qualified voters of the city and shall be appointed by the council for terms of four years.

§ 19.02. FUNCTIONS OF PLANNING COMMISSION. The planning commission shall be responsible for making recommendations to the council on all phases of city planning, including a master plan, zoning, and subdivision control. It shall have the powers and duties provided by general law and such other powers and duties as may be assigned by the council.

§ 19.03. BOARD OF ZONING APPEALS. There shall be a board of zoning appeals which shall consist of five members appointed for three-year terms by the circuit court of the city or the judges thereof in vacation.

§ 19.04. POWERS OF THE BOARD OF ZONING APPEALS. The board of zoning appeals shall have all powers granted to boards of zoning appeals by general law.

§ 19.05. APPEALS FROM ACTIONS OF THE BOARD OF ZONING APPEALS. Appeals from any action of the board of zoning appeals may be taken to the circuit court of the city in the manner prescribed by general law.

Chapter 20

ADMINISTRATION OF JUSTICE

§ 20.01. CIRCUIT COURT. The city shall continue to be in and a part of the Twenty-Eighth Judicial Circuit. The Circuit Court of Princess Anne County shall be known as the Circuit Court of the City of Virginia Beach and shall have the same jurisdiction in the City of Virginia Beach as is conferred by general law upon circuit courts of cities of the first class.

§ 20.02. TRANSITION OF CIRCUIT COURT. All actions of every kind, criminal as well as civil, pending in the circuit court of the county on the effective date of this charter shall automatically be transferred to, and shall proceed to final judgment in the circuit court of the city. The

circuit court of the city shall have full authority to issue writs, enforce judgments and decrees and exercise every manner of judicial function in relation to former actions in the circuit court of the county as though no change had been made in the status of the latter.

§ 20.03. MUNICIPAL COURT. There shall be a municipal court for the City of Virginia Beach. Such court shall have both civil and criminal jurisdiction, shall have such other judicial powers as are conferred by general law on municipal courts of cities of the first class, and shall hold court at such times in the boroughs of Princess Anne and Virginia Beach and at such other places as may be determined by the circuit court of the city.

§ 20.04. JUDGES OF THE MUNICIPAL COURT. There shall be a judge of the municipal court and such associate and substitute judges as may be deemed necessary by the council. The judges of such court shall be appointed for terms of four years by the circuit courts of the city or the judges thereof in vacation. Appointments to vacancies shall be made by the circuit court or the judges thereof in vacation and shall be for the unexpired term.

§ 20.05. JUVENILE AND DOMESTIC RELATIONS COURT. There shall be a juvenile and domestic relations [fol. 83] court for the city. Such court shall possess the same jurisdiction and powers as are conferred by law upon juvenile and domestic relations courts of cities of the first class.

§ 20.06. JUDGES OF THE JUVENILE AND DOMESTIC RELATIONS COURT. There shall be a judge of the juvenile and domestic relations court and such associate and substitute judges as may be deemed necessary by the council. The judges of such court shall be appointed for terms of four years by the circuit court of the city or the judges thereof in vacation. Appointments to vacancies shall be made by the circuit court or the judges thereof in vacation and shall be for the unexpired term.

§ 20.07. JUDGES OF COURTS NOT OF RECORD. Any judge, associate judge or substitute judge of the municipal court may also be the judge, or associate judge or substitute judge of the juvenile and domestic relations court.

§ 20.08. TRANSITION OF COURTS NOT OF RECORD. All actions of every kind, criminal as well as civil, pending in the county court of Princess Anne County or the police court of the City of Virginia Beach on the effective date of this charter shall automatically be transferred to, and shall proceed to final judgment in the municipal court or the juvenile and domestic relations court of the city, as the judges thereof may determine.

§ 20.09. CLERK OF COURTS NOT OF RECORD. The council may, at its discretion, provide for a single clerk for all courts not of record or a separate clerk for each court not of record. Each clerk shall be appointed by the court he serves.

§ 20.10. TRANSFER OF RECORDS. Upon the effective date of this charter all records and papers of the county court of Princess Anne County and the police court of the City of Virginia Beach shall be transferred to the appropriate courts of the city.

§ 20.11. HIGH CONSTABLE. The council shall appoint a high constable who shall serve at the pleasure of the council. He shall be the ministerial officer of the courts of the city and shall have such duties as the council may prescribe.

§ 20.12. JUSTICES OF THE PEACE. The circuit court of the city shall appoint such number of justices of the peace as it deems necessary, not to exceed eleven, to serve at its pleasure. The justices of the peace holding office in the City of Virginia Beach and Princess Anne County immediately preceding the effective date of this charter shall continue in office until the expiration of the terms for which they were elected.

§ 20.13. NOTARIES PUBLIC. Notaries public for Princess Anne County shall have full power and authority in the city until their commissions expire.

Chapter 21

MISCELLANEOUS AND TRANSITION PROVISIONS

§ 21.01. ASSETS AND LIABILITIES. Upon the effective date of this charter, all property, real and personal, of the City of Virginia Beach and Princess Anne County, including sanitary districts therein, shall be vested in and owned by the city, and any and all debts due the city and the county, including any sanitary districts therein, shall become due to the city. The city shall assume the payment of all the then outstanding indebtedness, bonded or otherwise; including interest thereon, and all of the then existing contracts and any other obligations of the city and the county, including any sanitary districts therein, in the same manner and to the same extent as if they were originally issued, made, entered into or arose directly by or with the city.

§ 21.02. ELECTION OF CONSTITUTIONAL OFFICERS. The offices of clerk of the circuit court, attorney for the Commonwealth, commissioner of revenue, city treasurer and city sergeant shall be elective and filled in accordance [fol. 84] with the provisions of the Constitution of the Commonwealth and in accordance with the provisions of general law.

§ 21.03. POWERS AND DUTIES OF CONSTITUTIONAL OFFICERS. The clerk of the circuit court of the city, attorney for the Commonwealth, commissioner of revenue, city treasurer, and city sergeant shall have such powers and perform such duties as are provided by the Constitution of the Commonwealth and, except as otherwise provided in this charter, as are provided by the provisions of general law for cities of the first class.

§ 21.04. PRESENT ORDINANCES AND RULES AND REGULATIONS CONTINUED IN EFFECT. All ordinances, rules, regulations and orders legally made by the City of Virginia Beach and Princess Anne County in force at the effective date of this charter, insofar as they or any portion thereof are not inconsistent herewith, or with the consolidation agreement between the City of Virginia Beach and Princess Anne County, shall remain in force and effect within the same area to which they were applicable at the effective date of this charter, until amended or repealed in accordance with the provisions of this charter or general law.

§ 21.05. PRELIMINARY MEETINGS OF COUNCIL. At any time after the General Assembly shall have enacted this charter the councilmen for the consolidated city are authorized and directed to meet at such times and places as they may determine for the purpose of considering the appointment of a city manager, the preparation of ordinances, appointments which are required of them and such other matters as may be necessary to effectuate the transition resulting from the consolidation of the city and the county.

§ 21.06. REPRESENTATION IN THE GENERAL ASSEMBLY. The granting of this charter shall in no way operate to affect or change the representation in the General Assembly of Virginia to which the people of the city were entitled at the time the charter was granted.

§ 21.07. SAVING CLAUSE. In the event that any portion, section or provision of this charter shall be declared illegal, invalid or unconstitutional by final judgment of any court of competent jurisdiction, such judgment shall not invalidate any other portion, section or provision hereof, but all parts of this charter not expressly held to be invalid shall remain in full force and effect.

[fol. 85]

[Handwritten notation: I. concur: Walter E. Hoffman,
U.S.D.J.—I concur: John D. Butzner, USDJ]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
Civil Action No. 4912

J. E. CLAYTON DAVIS, et al., Plaintiffs,

v.

FRANK A. DUSCH, et al., Defendants.

Civil Action No. 5006

FRANK V. COGLIANDRO, et als., Plaintiffs,

v.

H. R. McPHERSON, et als., Defendants.

OPINION DECIDED NOVEMBER 9, 1965

Argued September 21, 1965

Before Bryan, Circuit Judge, and Hoffman and Butzner,
District Judges.

Henry E. Howell, Jr. (Howell, Anninos & Daugherty) of
Norfolk, Virginia, attorney for plaintiffs.

Harry T. Marshall, City Attorney of the City of Virginia
Beach, of Virginia Beach, Virginia, William L. Forbes,
City Attorney of the City of Chesapeake, of Norfolk, Vir-
ginia, Harry Frazier, III (Hunton, Williams, Gay, Powell
& Gibson) of Richmond, Virginia, attorneys for the de-
fendants.

[File endorsement omitted]

[fol. 86] Albert V. Bryan, Circuit Judge:

Whether the principle of "one person, one vote" applies in the apportionment of members of a municipal council to the several boroughs of a city is the Constitutional question in both of these actions. The immediate issue is whether this question requires a three-judge court to answer it.

The City of Virginia Beach in one case and the City of Chesapeake in the other, both political subdivisions of Virginia, are the municipalities in suit. Plaintiffs in each instance are citizens and qualified voters; defendants are the councilmen and other civic and electoral officials acting under the charters issued to the cities by the State. The governing body in each is a council. The charter establishes its membership. More particularly, it defines the boundaries of the boroughs, and assigns to each a specified number of councilmen for election.

This assignment is now attacked as invalid as a malapportionment violative of the Equal Protection Clause, *Davis v. Mann*, 377 US 678 (1964); and we are asked, because of this alleged Constitutional infirmity in the charter, to enjoin the performance of city functions under it. At the start we are met with the defendants' motion to dissolve the multiple-judge court, which was convened on the prayer of the complaints, and to allow the trial to [fol. 87] proceed before the resident judge alone. The point made is that the controversy is of a local nature, without statewide significance, and so not within the intendment of 28 USC 2281. We agree.

The Virginia Beach charter incorporates into a single city the area of the former city of that name plus all of Princess Anne County. Chesapeake is composed of what was the City of South Norfolk with the addition of Norfolk County. Both charters were granted by special acts of the General Assembly in 1962 on the basis of agreements between the governing bodies of the consolidating areas approved by popular referenda. The apportionments of councilmen in the new cities were stated in the agreements.

A proviso in each charter requires that a new plan for the election of councilmen be submitted to the qualified voters of the city not earlier than five years after the adoption of the charter and not later than September 1, 1971.

Obviously, the apportionments made by the charters, besides being only temporary, are not of statewide interest. Their interpretation would not affect any other municipality or county in Virginia. In such unique situations the requirement of 28 USC 2281, that only a three-judge court may enjoin State officers in carrying out the directions of a State law, is not applicable. This is true here whether the defendants be considered as State or city officers. *Rorick v. Board of Comm'rs*, 307 US 208, 212-13 (1939); *Teeval Co. v. City of New York*, 88 F.Supp. 652 (SDNY 1950); see, e.g., *Bianchi v. Griffing*, 238 F.Supp. 997, 998 (EDNY 1965); appeal dismissed for want of jurisdiction, 34 U.S.L. Week 3117 (U.S. Oct. 12, 1965); *McMillan v. Wagner*, 239 F.Supp. 32, 33 (SDNY 1964).

Furthermore, we think that a three-judge court is also inappropriate because this litigation no longer presents a Constitutional question which is beyond the jurisdiction of a sole District Judge. The statute does not require three judges where the decision will be governed by the application of Constitutional principles already authoritatively established. *James & Co. v. Morgenthau*, 307 US 171, 172; *Harvey v. Early*, 160 F.2d 836, 838 (4 Cir. 1947). That the "one person, one vote" precept embraces councilmanic representation is now settled in this Circuit. *Ellis v. Mayor and City Council of Baltimore* (4 Cir. October 11, 1965); see also *Bianchi v. Griffing*, supra, 238 F.Supp. 997 (EDNY 1965) and authorities cited therein. Moreover, the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city is not denied by the defendants. What may now and subsequently have to be decided in these cases are matters well within the province and for the judgment of a one-judge court.

[fol. 89] An order will be passed dissolving the three-judge court, and remanding the complaints to the judge

of this court at Norfolk (to whom they were first presented) for direction of such remedies as he deems necessary or proper.

November 9th, 1965.

[fol. 90]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Civil Action No. 4912

J. E. CLAYTON DAVIS, et al., Plaintiffs,

v.

FRANK A. DUSCH, et al., Defendants.

Civil Action No. 5006

FRANK V. COGLIANDRO, et als., Plaintiffs,

v.

H. R. McPHERSON, et als., Defendants.

ORDER DISSOLVING THREE-JUDGE COURT—November 9, 1965

Upon consideration of the motions of the defendants in each of these cases to dissolve the three-judge court heretofore constituted for the hearing of them, the Court has concluded, for the reasons stated in its written opinion this day filed, that the said motions should be granted, and, therefore, it is

[File endorsement omitted]

Ordered that the three-judge court be, and it is hereby, [fol. 91] dissolved in each of these cases, and that they be, and are now, remanded for hearing and decision to the District Judge at Norfolk to whom the complaints in these suits were originally presented.

Albert V. Bryan, United States Circuit Judge;

Walter E. Hoffman, United States District Judge;

John D. Butzner, United States District Judge.

November 9th, 1965.

[fol. 92]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 4912

J. E. CLAYTON DAVIS, et al., Plaintiffs,

v.

FRANK A. DUSCH, et al., Defendants.

Civil Action No. 5006

FRANK V. COGLIANDRO, et als., Plaintiffs,

v.

H. R. McPHERSON, et als., Defendants.

MEMORANDUM OPINION—December 7, 1965

These consolidated actions involve the constitutionality of the apportionment of members of the city councils of the City of Virginia Beach (Civil Action 4912) and the City of Chesapeake (Civil Action 5006). The charter of

[File endorsement omitted]

each city establishes the membership of the council body by defining the boundaries of the several districts or boroughs, with each district or borough being assigned a specified number of councilmen for election.

Originally these matters were heard before a three-judge court and, by agreement of counsel, it was stipulated that the evidence submitted in the three-judge court hearing could be considered by the judge to whom these cases were first presented in the event the three-judge court arrived at the conclusion that the court should be dissolved.

By order entered and filed on November 9, 1965, the three-judge court was dissolved for reasons stated in an opinion by Circuit Judge Albert V. Bryan.

[fol. 93] The opinion of Judge Bryan clearly forecasts the inevitable result in these cases. The factual findings and legal conclusions are incorporated herein by reference. The recent decision in *Ellis v. Mayor and City Council of Baltimore* (4 Cir., October 11, 1965) adopts the "one person, one vote" doctrine to councilmanic representation. And "the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city"—as stated by Judge Bryan—is not denied by any of the defendants. There remains for consideration only the discretion to be exercised in determining how long the temporary systems of representation should continue, bearing in mind that each city was created, essentially to avoid annexation of portions of pre-existing counties, pursuant to charters granted by the General Assembly of Virginia at its 1962 session, the charters being effective January 1, 1963.

Since the three-judge court opinion does not specifically set forth the existing disparities constituting invidious discrimination, it may be well to make these brief additional findings.

Virginia Beach

Representation on Council	District or Borough	Population per District	Estimated Population per District (1/1/64)
1	Blackwater	733	862
1	Pungo	2504	2806
1	Princess Anne	7211	7957
1	Kempsville	13900	22254
1	Lynnhaven	23731	37760
1	Bayside	29048	36027
5	Virginia Beach	8091	10473

[fol. 94] The disparity of representation as revealed by the foregoing figures is too clear to require further discussion. We need not refer to the tax differential which establishes that certain districts or boroughs are effectively without representation, even though they maintain the greater portion of the tax burden.

Chesapeake

Representation on Council	District or Borough	Population per District—1960
5	South Norfolk	22,035
1	Butts Road	3,346
1	Deep Creek	11,719
1	Pleasant Grove	7,073
1	Washington	18,952
1	Western Branch	10,522

Once again the disparity of representation is obvious. Further, the charter of the City of Chesapeake provides for a tie-breaker designated by the Corporation Court to cast a vote whenever there is an equally divided vote among the members.

Taking cognizance of the fact that the General Assembly of Virginia is scheduled to meet in Regular Session during January, 1966, the Court is of the opinion that no order

should be immediately entered, other than to stay further proceedings until the commencement of the constructive session on or about March 14, 1966. By that time we will all know what, if anything, has been done by the legislative body of the Commonwealth of Virginia. The City of Virginia Beach has stated that it proposes to submit charter changes touching upon councilmanic representation. The wisdom and constitutionality of these proposed changes are not before the court at this time. If the plain-[fol. 95] tiffs are dissatisfied with such changes, and arrive at the conclusion that mal-apportionment still exists, they may file a supplemental complaint at the time of the commencement of the constructive session. The City of Chesapeake has not indicated that any charter change will be requested. Such determination is a matter for decision by its legislative representatives and the existing members of the city council. Whatever the final decision may be, this Court is not persuaded that action should be delayed until the 1968 Session of the General Assembly, or until five years following the adoption of the charter. If no constitutional action is taken by the 1966 General Assembly, there will remain the only alternative which will be to order the election of the members of the respective councils on an "at large" basis at such conveniently early date as may be determined by the Court.

The Court reserves for further determination the question of the constitutionality of the tie-breaker as provided by the charter of the City of Chesapeake. This issue may become moot if charter changes are made.

Without passing upon the argument that attorneys' fees should be taxed in favor of the plaintiffs in these actions, it cannot be said that defendants have been guilty of bad faith in not requesting charter changes at the recent Special Session of the General Assembly convened for the purpose of apportioning the congressional districts following a decision by the Supreme Court of Appeals of Virginia. [fol. 96] It was a matter of general knowledge that the

Governor expressed a desire to limit the legislative business at that time. Moreover, the *Ellis* case was not decided until after the three-judge court hearing and the law on the subject was not as clear as it now is.

The right is reserved to renew the request for attorneys' fees in the event further proceedings become necessary but such reservation is without any intimation that these cases are within the limited field of equity matters in which allowances have been made.

Walter E. Hoffman, United States District Judge.
Norfolk, Virginia.

December 7, 1965

[fol. 97]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Civil Action No. 4912

J. E. CLAYTON DAVIS, et al., Plaintiffs,

v.

FRANK A. DUSCH, et al., Defendants.

Civil Action No. 5006

FRANK V. COGLIANDRO, et als., Plaintiffs,

v.

H. B. McPHERSON, et als., Defendants.

ORDER STAYING FURTHER PROCEEDINGS—December 7, 1965

For reasons stated in a memorandum this day filed, the further proceedings in these cases are stayed and the matters are continued until March 14, 1966, at which time

[File endorsement omitted]

further proceedings may be had on motion of any party in interest.

The Clerk will forward copies of the memorandum and certified copies of this order to counsel of record.

Walter E. Hoffman, United States District Judge.
Norfolk, Virginia

[fol. 98]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
Civil No. 4912.

J. E. CLAYTON DAVIS, et al., Plaintiffs,

vs.

FRANK A. DUSCH, et al., Defendants.

VOTERS' SUPPLEMENTAL COMPLAINT FILED PURSUANT TO
AUTHORITY CONTAINED IN THE MEMORANDUM OPINION OF
THIS COURT DATED DECEMBER 7, 1965—Filed March 8,
1966

I.

Plaintiffs adopt each and every allegation contained in the original complaint and the amended complaint heretofore filed in this cause as if restated herein, and in addition thereto allege as follows:

II.

That following the Memorandum Opinion and Order of this Court entered December 7, 1965, the General Assembly

[File endorsement omitted]

of the State of Virginia has convened its 1966 Session, during which Session there has been enacted into law an amendment to the Charter of the City of Virginia Beach, Virginia, providing for the election of the members of the Council of the City of Virginia Beach, Virginia. The per-[fol. 99] tinent portions of the subject charter amendment are attached hereto, marked as Exhibit "A".

III.

The subject charter amendment provides for the election of an eleven (11) member City Council and prescribes that all eleven (11) members shall be voted on by the electorate at large, but only four (4) of the eleven (11) members will receive the full weight and voting value of the electors at large, for the Act further provides that there be seven (7) residential councilmen, which, in turn, requires that there be at least one (1) councilman elected for each of the seven (7) residential councilmanic seats.

IV.

The aforesaid enacted charter amendment does not constitute constitutional action on the part of the 1966 General Assembly, with reference to the constituency and organization of the Council of the City of Virginia Beach, which has heretofore been decreed unconstitutional by the Memorandum Opinion and Order of this Court entered December 7, 1965.

V.

Under the provisions of the amended charter, the vote of the plaintiffs and other citizens of the City of Virginia Beach, Virginia, will be illegally diluted, for under the plan the citizens of the Blackwater are granted a residen-[fol. 100] tial councilman for every 862 persons, whereas it takes more than forty (40) times more people to entitle the citizens of Lynnhaven District to a residential councilman, and the candidates receiving the greatest numbers of votes will not be elected. Under this plan, in a contested

election, the eight (8) candidates receiving the largest number of votes could be candidates for the four (4) at large seats, but only four (4) of these candidates would be elected to the Council and residential candidates obtaining fewer votes would be elected.

VI.

Plaintiffs aver that when the inequalities in the above mentioned charter amendment are considered together, they result in a distortion of the constitutional system as established, defined and guaranteed by the Fourteenth Amendment to the Constitution of the United States; that this distortion prevents the City Council of the City of Virginia Beach from being a body representative of the City of Virginia Beach and denies to plaintiffs the equal protection of the laws; and results in even more invidious discrimination than afforded under the form of government heretofore decreed null and void by order of this Court. Plaintiffs further aver that as result thereof a minority of the people of the City of Virginia Beach could control the deliberations and decisions of the City Council of the City of Virginia Beach contrary to the Constitution of the United States of America.

[fol. 101]

VII.

Plaintiffs aver that the unconstitutional apportionment aforesaid can be made constitutional only by elections at large and unless the inequities herein complained of are corrected by this Court the plaintiffs and all others similarly situated will continue to be denied the equal protection of the laws and each day that the malapportioned Council of the City of Virginia Beach continues to function the plaintiffs herein will be irreparably damaged.

VIII.

Plaintiffs appeared at a public hearing held by the Council of the City of Virginia Beach, Virginia, and made clear the unconstitutionality of the aforesaid charter amendment,

then known as the "Seven-Four Plan", and again appeared at the hearing held before the Committee on Counties, Cities and Towns of the Virginia General Assembly, but notwithstanding the patent unconstitutionality of the plan, the defendants persisted in its promulgation and thereby have protracted this litigation and caused plaintiffs to incur substantial additional expense for attorneys' fees and other related expenses.

Wherefore, plaintiffs pray:

A. That this Court decree that the present apportionment of the Council of the City of Virginia Beach, Virginia, denies the plaintiffs and others similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America.

[fol.102] B. That this Court decree that the amendment to the Charter of the City of Virginia Beach as created and granted by the Commonwealth of Virginia, insofar as it relates to the composition of the Council thereof as now in force, is unconstitutional, null and void.

C. That upon final hearing of this action this Court will grant to the plaintiffs the following relief:

(1) That the defendant members of the Electoral Board of the City of Virginia Beach, Virginia, and all other officials having any duties or authority with respect to elections, be enjoined from printing ballots or holding any elections, primary or otherwise, pursuant to the provisions of the amended Charter of the City of Virginia Beach, Virginia, until there be at large elections for representation on the Council of the City of Virginia Beach, Virginia.

(2) That this Court decree that the election of members of Council of the City of Virginia Beach, Virginia, be held on an at large basis not later than June 14, 1966.

(3) That this Court decree to the plaintiffs an allowance of attorneys' fees and costs and the additional expenses

incurred and made necessary by the unjustified actions of the defendants herein.

(4) That plaintiffs may have such other, further and alternative relief as the nature of this action may require [fol. 103] and this Court may deem proper.

J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully, Howard W. Martin.

Subscribed and sworn to before me this 7th day of March, 1966.

Catherine J. Crane, Notary Public.

My commission expires November 16, 1969.

Howell, Anninos & Daugherty, 808 Maritime Tower, Norfolk, Virginia, Counsel for Plaintiffs.

Certificate of Service (omitted in printing).

[fol. 104]

EXHIBIT "A" TO SUPPLEMENTAL COMPLAINT

**UNDERScoreD PORTIONS REPRESENT CHARTER
AMENDMENTS EFFECTED BY 1966 GENERAL
ASSEMBLY ENACTED**

§ 3.01 COMPOSITION. The City shall be divided into seven boroughs. One of such boroughs shall comprise the City of Virginia Beach as existing preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the remaining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. *The council shall consist of eleven members, one to be elected by the city at large from among the residents of each of*

the seven boroughs and four to be elected by and from the city at large.

§ 3.02 ELECTION OF COUNCILMEN. *On the second Tuesday in June 1966, and on the second Tuesday in June of every fourth year thereafter, there shall be a general election at which the qualified voters of the city shall elect eleven councilmen for terms of four years beginning the first day of September next following the date of their election and until their successors are duly elected and qualified. Each candidate shall state whether he is running at large or from the borough of his residence, but otherwise candidates shall be nominated under general law. Election and qualification of councilmen in 1966 shall terminate the terms of all incumbent councilmen, even though they may have been elected for longer terms.*

[fol. 105]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
Civil Action No. 4912

J. E. CLAYTON DAVIS, et als., Plaintiffs,

v.

FRANK A. DUSCH, et als., Defendants.

ANSWER TO SUPPLEMENTAL COMPLAINT—
Filed March 16, 1966

For answer to the supplemental complaint filed by the plaintiffs, J. E. Clayton Davis, et als, the defendants, Frank A. Dusch, et als, adopt their answers to the original

[File endorsement omitted]

and amended complaints previously filed and state further as follows:

1. The allegations of paragraph II are admitted.
 2. Defendants deny that only four of the eleven councilmen receive the full weight and voting value of the electors but admit all other allegations of paragraph III.
 3. The allegations of paragraphs IV, V, VI and VII are denied.
 4. Defendants admit that the plaintiffs appeared at the public hearings held by the Council of the City of Virginia Beach and the House Committee on Counties, Cities and Towns of the General Assembly of Virginia and objected to the Charter amendments but deny all other allegations of paragraph VIII.
- [fol. 106] 5. The supplemental complaint fails to state a claim upon which relief can be granted.

Wherefore, the defendants pray that in view of the primary to be held April 5, 1966, for the election of party nominees for the general election to be held June 14, 1966, the Court grant the parties to this action a prompt hearing and rule promptly on the issues presented, that the Court determine that the apportionment of the City Council as provided in the 1966 Charter amendments does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution and that the Court deny all relief requested by the plaintiffs and dismiss the supplemental complaint.

Frank A. Dusch, John McCombs, Edward T. Caton, III, W. H. Kitchin, Jr., L. S. Hodges, S. Paul Brown, Swindell Pollock, Kenneth N. Whitehurst, Lawrence E. Marshall, James Darden, Earl Tebault, John B. James, Harry Bailey, Joseph T. Crosswhite, Sr., V. Alfred Etheridge, Ivan D. Mapp, William P. Kellam and P. B. White; Harry Frazier, III, Counsel for Defendants.

Harry T. Marshall, City Attorney, 201 Courthouse Drive,
Princess Anne Station, Virginia Beach, Virginia 23456.

Archibald G. Robertson, Harry Frazier, III, Hunton,
Williams, Gay, Powell & Gibson, 1003 Electric Building,
Richmond, Virginia 23212.

[fol. 107] Certificate of Service (omitted in printing).

[fol. 108]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

Civil Action No. 4912

J. E. CLAYTON DAVIS, et al.,

v.

FRANK A. DUSCH, Member, City Council, City of
Virginia Beach, et al.

Transcript of Hearing on Supplemental Complaint—
March 23, 1966.

Norfolk, Virginia
(2:00 P.M.)

Before Hon. Walter E. Hoffman, Ch. J.

PRESENT:

Howell, Anninos and Daugherty (808 Maritime Tower,
Norfolk, Va.), By Henry E. Howell, Jr., Esq., for the
plaintiffs;

Hunton, Williams, Gay, Powell and Gibson (1003 Elec-
tric Bldg., Richmond, Va. 23212), By Harry Frazier, III,
Esq.,

and

Harry T. Marshall, Esq. (City Attorney, City of Vir-
ginia Beach, Va.), for the defendants.

• • • • •

[fol. 109] EDWARD T. CATON, having been first duly sworn, was examined and testified as follows:

[fol. 110] Direct examination.

By Mr. Howell:

Mr. Caton, you were a member of the Council of the City of Virginia Beach during what years? What years did you—

A. Well, I was a councilman for what is now the Borough of Virginia Beach from 1958 until it merged with the County of Princess Anne, and then I served as a council-[fol. 111] man of the merged City of Virginia Beach until January 1st, or shortly after January—the first week in January 1966.

Q. And you were a member of the Council of the City of Virginia Beach at the time that they considered requesting the General Assembly to permit it to amend its charter to adopt what is known as the Seven-Four plan of councilmanic composition?

A. I was a member of the Council at that time.

[fol. 112] Q. Why did the Council of the City of Virginia Beach decide upon and propose to the General Assembly of Virginia that there be 7 residential councilmen as an essential part of the Seven-Four plan that is embodied in the new amended charter of the City of Virginia Beach?

A. Well, counsel for the City—

[fol. 113] Q. When you say—excuse me, did you mean the City Council—

A. No.

Q. — or the lawyer for the City?

A. The lawyer for the Council gave to us, I believe, four suggested plans, of which he was of the opinion in various

degrees of their application to the one man, one vote ruling of the Supreme Court.

Q. Now, may I interrupt you there since you brought it up in that way?

Did he give number-one priority and sort of a total blessing to holding elections at large?

A. I don't think he made any particular—

Q. That was one of the plans?

A. Right.

I beg your pardon? Say that again.

Q. Was that one of his suggestions that—

A. What, the one that we have adopted?

Q. No. Was one of the four suggestions that he made to the Council, and did it include elections at large in which the Council would be voted on by all of the people without reference to any residential requirements?

A. Oh, yes, that was one of the proposals.

[fol. 114] Q. I would now like to direct your attention as to why the Council decided upon the Seven-Four plan.

A. Well, the Council felt that, as I recall, this plan was best for the City as it is now constituted, the reason being that Virginia Beach, as I am sure you realize, is a very large geographic community, and it is also a rapidly changing community from urban to rural.

The Council, I think, recognized that modern municipal government, to be very frank with you, does usually select an at-large type of representation for its councils.

However, the City of Virginia Beach, as I just indicated, is in a transition period, which was recognized by the charter—

Q. Wait. What was the—

A. Well, we thought—

Q. Where are they transcending from, from where to where?

A. Well, it is growing from rural to urban.

The Court: You previously said from urban to rural.
[fol. 115] The Witness: I beg your pardon, Your Honor.
It is the other way.

By Mr. Howell:

Q. I am sorry to interrupt you—

A. From rural to urban.

Q. —but in view of this transition from urban to rural—

A. Right.

And the feeling was that the Council—that we needed the knowledge on the Council that men from rural areas of the city could provide in the orderly regulation of the City of Virginia Beach.

I might point out that, as on both occasions you mentioned, I have pointed out to the House of Delegates and also the public at that hearing you mentioned, the city public hearing, that agriculture is still the largest industry in the City of Virginia Beach.

And I think the Council recognized that in orderly governing of the present community of Virginia Beach the wisdom or knowledge of men versed in this type of economy that Virginia Beach has were needed on the City Council. And they provided that this way there would be men on the Council from these areas that are totally rural. [fol. 116] However, the Council did recognize that, as pointed out to us by our counsel, the need for the elections to give every man in the city the right to make the selection.

Therefore, we provided for the total at-large selection of councilmen, that is, that everybody in the city would elect all 11 councilmen, and that one would be from each—a residence requirement from each of the boroughs, with four at-large without any residence requirement.

Q. Is it fair to state, based on your testimony, that the motivating factor in the Council of the City of Virginia Beach deciding on the residential requirement for 7 of the 11 councilmen was to guarantee the election of at least a

certain number of agriculturally-educated and oriented councilmen?

A. Well, I would say that the plan that was presented would insure those communities, or at least would indicate to the public, and would result in an election where the men with this background would serve on the Council, and with this knowledge.

Q. And the residential areas were delineated the same way and with the same geographical boundaries as the magisterial districts that were inherited from the County of Princess Anne and which were the boundaries that [fol. 117] composed the boroughs which were the subject of the Court's opinion holding that the previous existing borough system was unconstitutional? There has been no change—

A. I don't—

Q. — in the geographical limits of the boroughs between the borough system that Judge Hoffman ruled on and the geographical limits of the boroughs under the Seven-Four plan?

A. You will have to state that question again.

Q. Has there been any change in the borough limits, geographical limits of the boroughs or voting districts, under the Seven-Four plan as compared to the borough system that we had—

A. The boroughs, as were constituted at the time of merger, are exactly the same.

Q. I see.

So that the guarantee of agricultural representation on the Council was in no way related to the number of inhabitants within the residential districts from which these councilmen would be elected?

A. I am not sure I follow you. I am sorry, Mr. Howell. What are—

Q. You have testified that the purpose of the Seven-Four plan is to insure, in your words, representation from Black-[fol. 118] water District, Princess Anne District, taking two of them, of individuals who have experience and are

intimately acquainted with agricultural problems, since agriculture is still the main business of the City of Virginia Beach?

A. Well, that is one of the—

That wasn't the only reason.

Q. That was one of the reasons?

A. That was one of the reasons.

Q. I am asking you was there any other reason that you decided upon a residential prerequisite for the election of 7 of the 11 councilmen?

A. Yes, there were other reasons.

Q. Now, would you tell us, please?

A. Another one was the size, geographically, of the city. As you probably know, in the heavily-populated community of the northern Virginia Beach—the most heavily or a good, heavily-populated area, if a man, say, from Blackwater in the southern part of the city desired to discuss something with his councilman, he would have to ride approximately 35 to 40 miles to see him.

The members of the Council thought that during this transition period that it would be well to keep the government in reasonable proximity to the constituency, and to have these people living in these areas would give them [fol. 119] that right to promptly visit their councilmen.

Q. So that—

A. That was the second reason, or another reason.

We had another reason.

Q. We have economic interests, and then we have the distance from Blackwater to Princess Anne Courthouse as the second reason. Now, were there any other reasons?

A. Well, yes, I think as a third reason that, as I have already indicated, I think the Council recognized—and we have a city manager form of government, and I think we are as anxious to have it as modern as possible—I think that the Council recognized that the combination of the 4 at-large with the rest—with all at-large, that is, with a residence requirement for 7 of them was a happy stopping

point between on the one hand what you might call the borough, total borough, system of the old rural community of the County of Princess Anne, which we now have in many counties in this state, as you well know, where they are elected from the boroughs by themselves or the magisterial districts, to the ultimate of an at-large system.

This Seven-Four plan is a combination of the two that we felt, that the majority of the Council felt, was a stopping point in this transition period that the City of Virginia Beach is experiencing.

[fol. 120] Q. When you say a stopping point, now—

A. What I mean is—

Q. — where is it you are trying to stop short of?

A. I don't think there is any secret about the fact, Mr. Howell, eventually as the city grows and as the community progresses that it won't be too long before the Council will suggest that all councilmen be elected at large.

Q. Let's get back.

You said that it was a happy stopping point. So that we can get that on the record in a factual manner, what is the goal that you wanted to stop short of? Where were you trying to stop with respect to the goal?

A. Well, what were trying to do, Mr. Howell, was to meet the needs of our community and to provide the best type of government that we had, and our community is unique. In fact, it was the first one of its type in the State of Virginia.

Q. Who was first, Chesapeake or Virginia Beach?

A. Virginia Beach.

Q. Chesapeake was born right shortly thereafter?

A. Very quickly thereafter, very much like Virginia Beach.

And, as I say, in meeting these needs we felt that this was a plan that fit the circumstances of our transitory community.

[fol. 121] Q. Mr. Caton, I certainly don't want to press too far, but I have gotten clear in my mind the economic

factor of having an agriculturally-oriented councilman insured, and I have gotten in my mind the problems of getting to your councilman. The third one I have not gotten on the record sufficiently so that it is clear to me.

You said the only other factor, I believe—

A. No, I—

Q. —or the third factor—

A. Well, may I repeat it? Maybe I could make it clearer.

Q. No. You said that if constituted, that this Seven-Four plan constituted, a happy stopping point in this transitional period.

If I may lead you, in other words, it stops short of giving the full value of the vote to a voting citizen to choose any councilman that he might want. It gave him a chance to vote, but he has to vote for at least one man that lived in Blackwater.

A. Well, I wouldn't put it that way. I would rather put it that the modern system of an urban city is at-large elections, that is, where it is heavily urban, that is, it is an urban community. Virginia Beach is not yet in that situation.

And I said that the Council felt that the combination of election of all of them at large would require that they be [fol. 122] dispersed in the communities where the population had not yet gotten to this urban situation was—that they felt it was wise to have this transition period, and to have this type of plan.

ROLLAND WINTER, having been first duly sworn, was examined and testified as follows:

Direct examination.

[fol. 123] (A chart was marked for identification as P-2.)

By Mr. Howell:

Q. Now, getting over to the side, will you explain to us in such detail as you deem necessary what that chart reflects with reference to the Seven-Four plan?

A. As the Seven-Four plan is now outlined in the briefs, we have three seats that are guaranteed to the three largest boroughs. These three large boroughs contain approximately 81% of the population.

Q. Now, when you say guaranteed, what is the factor that insures the guarantee?

[fol. 124] A. By the requirement of residency.

Q. All right, sir.

A. In addition, we can see that there are four seats left over out of the seven that are guaranteed, and they are from the four smaller boroughs, representing less than 20% of the population of The Beach.

[fol. 125] Q. Limiting my question to the residential, the seven residential councilmen, what is the disparity ratio existing between the Lynnhaven residential councilman and the Blackwater residential councilman? That involves figuring for me the disparity between 38,000 and 900. I know that is not too complicated for many people, but I would like for you to put that in the record.

[fol. 126] With that the witness will be yours, Mr. Frazier.

A. Approximately 42-to-1.

[fol. 127] F. MASON GAMAGE, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Frazier:

Q. Please state your name, your residence, and your occupation.

A. Mason Gamage. I reside at 625 West Lynnhore Circle, Virginia Beach, Kempsville Borough. I am employed as planning director for the City of Virginia Beach.

Q. How long have you been employed as planning director, sir?

A. Since 1952, prior to the merger, and during the period prior to the merger I was employed by the City of Virginia Beach, or the Virginia Beach Borough, in the same capacity.

[fol. 128] Q. Mr. Gamage, would you highlight the physical economic characteristics of the boroughs, one by one. I don't want detail. I want the crucial essentials about each borough.

A. Mr. Frazier, I believe you asked me an earlier question about an area of the city. Did you wish that answered?

By Mr. Frazier:

Q. Yes, sir. I beg your pardon.

A. 301.6 square miles, of which 79.6 would be water.

Q. Leaving a land area of what?

A. I believe 122—or 222.

Q. Thank you.

Now, let's come to the second of the two questions that I asked you at once.

A. Well, these boroughs are composed of the former [fol. 129] magisterial districts of the County of Princess Anne and the former City of Virginia Beach.

Q. Let's start so that we can hurry along, and tell me first about Bayside Borough.

A. Well, Bayside is approximately 28 square miles in area, and for all purposes originally was closely allied to the development of Norfolk or a suburb of Norfolk.

It has perhaps three railroads serving it for industrial development, the Amphibious Base at Little Creek, and it

has a considerable amount of farm land, most of which has been sold for development purposes.

Q. Is it primarily a residential borough?

A. Yes.

Q. Does it also have more or less commercial attributes than other boroughs?

A. It does. It is well served with highways, water, and is in the process of being served to a great degree by a sewer. And it has in its boundaries some of the newer commercial developments, such as the Pembroke Shopping Center.

Q. How about the Bayside Borough?

The Court: That is what he was just talking about.

By Mr. Frazier:

Q. I am sorry. How about the Lynnhaven Borough?

[fol. 130] A. Lynnhaven contains 47 acres—47 square miles, approximately, and is more closely allied to the Borough of Virginia Beach and its development, and it contains numbers of fine homes.

It is allied also to the shellfish industry, having within its boundaries a good portion of the Lynnhaven and Broad Bays. Oystering, crabbing and that sort of thing is an economic phase.

Also, Fort Story and a large portion of Oceana Airfield are within the boundaries, together with a portion of Camp Pendleton.

Q. Would you say that this is primarily a residential type development?

A. With the exceptions which I mentioned, yes.

Q. All right, now, let's go to Kempsville.

A. Well, Kempsville still contains quite a bit of farm land.

The Kempsville Borough is situated south of Bayside and extends on down to the Intercoastal Waterway, adjacent to Princess Anne Borough. It is well served with

highways, and it is fast growing, depending on the extension of utilities to serve its growth.

Primarily the business avenues would be the Military Highway and the Princess Anne Road.

[fol. 131] Q. Now, did I understand you to say this is in a state of transition from primarily agricultural over to residential development?

A. Yes. As the growth expands from the north and from the west from Norfolk, the growth is coming along with the improvement of the utilities, water and sewer.

Q. Are substantial utility extensions into that area now in process?

A. Yes. Water, sewer and a portion of the toll road and the Interstate Highway.

Q. Now, let's go to the Virginia Beach Borough.

A. The Virginia Beach Borough, I believe contains 2.4 square miles. Of this it is largely related to the tourist [fol. 132] industry, the tourist trade, through the presence of the beach, the waterfront, and it serves, I would say, a great deal as a residence for members of the armed forces and school teachers primarily during the winter months. In the summer months the residences and apartments are available to the tourist industry.

Q. Next I guess would be Princess Anne, wouldn't it?

A. Princess Anne of 58.6 square miles is perhaps the next to receive some of the largest amount of growth or transition from rural to urban.

The county seat, former county seat, and present administrative facilities are located at the court house at Princess Anne.

Water is planned to be extended to the court house complex. Sewer is there at the moment. It has on its east the Atlantic Ocean and the suburban community or summer resort of Sandbridge.

There has been approximately 1500 acres of land acquired south of the Lynnhaven Borough, which will be in

the path of development, and only this week we received development plans of a tentative nature on this 1500 acres. So that the development is coming in that direction.

Q. Its economy today, would that be primarily agricultural [fol. 133] cultural as opposed to residential?

A. Primarily agricultural. And the city government perhaps the largest single employer.

Q. Next I suppose would be Pungo or Blackwater.

A. Well, Pungo with 94.4 square miles. Of this 63 square miles is water, which I think is a significant figure.

Ultimately perhaps Pungo will be very important. It contains an airfield which was formerly owned by the government and has for that reason certainly industrial possibilities.

There are no public water or sewer facilities in Pungo that I know of. However, due to the number of miles, square miles, of attractive farm land and to the beauty of its beaches and bay fronts it no doubt will develop very well, very favorably, as a satellite of Princess Anne Borough, for example.

Q. Now, take the last borough.

A. The Borough of Blackwater of 34 square miles is, for all practical purposes, agricultural and farming and forestry and no doubt will stay that way for quite some time.

It is situated on the Intercoastal Waterway, by Carolina on one side and Chesapeake on the other. And unless we were to experience the installation of some large type of government assistance program, such as an atomic re-[fol. 134] search plant or something of that kind, which would be difficult to forecast, it would probably remain in its present category.

I do have, incidentally, the figure of Kempsville square miles, which was 36.6, Mr. Howell.

EDWARD T. CATON, having been previously duly sworn, was further examined and testified as follows:

The Court: Mr. Caton has previously been sworn. His oath will remain in effect.

Direct examination.

By Mr. Frazier:

Q. Mr. Caton, I hope that we will not repeat matters to which you have previously testified, but I do want to consider somewhat the further deliberations regarding the plan that was ultimately adopted by the City Council.

I think you testified adequately as to the reasons why you did not adopt the strictly at-large without residential requirement. We covered that, didn't we?

A. Yes.

[fol. 135] Q. Now, a second plan, I believe, was the one that was ultimately adopted. What were the other two plans that were considered?

[fol. 136] Q. Now, state what another plan was and the considerations surrounding it.

A. Well, the second plan that we considered was equal election districts, that is, divide the city into districts of approximately equal population.

The Council considered that and felt that without population explosion that we would probably have to rearrange those election districts practically every election. And for that reason that plan was passed.

Q. What was the fourth one?

A. I believe the fourth plan was total at-large election with residence requirements from each borough without the floater candidates.

Q. All right. And that was rejected?

[fol. 137] A. Well, that relates to what I previously stated, that the Council recognized that we were in a transition period, and they thought that the combination of the

at-large without any residence requirements and with that partial residence requirement was more in keeping with providing the type of government that we felt was needed.

Q. Now, in answer to questions by Mr. Howell you discussed—

A. I might point out, Mr. Frazier, one other thing that just popped in my mind.

The difficulty with reference to the equal election districts, too, is that the present boroughs as they are constituted have debts that were created while they were either magisterial districts or the former City of Virginia Beach. And it was felt that to cross those lines with the election districts where these boroughs would have to remain by reason of the fact of these debts would confuse matters considerably. That was one of the other reasons that the equal election districts were rejected.

Q. And on the same line there, does your charter permit the levy of tax rates within those boroughs for special purposes?

A. Yes, it does. One of the reasons is to pay these debts.

Q. Does this also apply for other reasons?

[fol. 138] A. Yes.

Well, it applies for those boroughs that are not fully developed that want to develop. They can provide the money to develop them, whereas others might already be developed.

Q. I take it from what you said that the rates—that these would be additional levies over and above the city levy?

A. Yes.

[fol. 139] Cross examination.

By Mr. Howell:

Q. Other than lawyers. In other words, did you all know that no place in the United States of America is there a Seven-Four plan existing in municipal government?

A. Well, just as I pointed out, I don't know of any other place in America exactly like the merger of Virginia Beach and Princess Anne County.

[fol. 140]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
Civil Action No. 4912

J. E. CLAYTON DAVIS, et al., Plaintiffs,
vs.
FRANK A. DUSCH, et al., Defendants.

MEMORANDUM OPINION—April 8, 1966

By the terms of House Bill 101, the 1966 Session of the General Assembly of Virginia amended and reenacted certain provisions of the charter of the City of Virginia Beach in an effort to remedy the constitutional defects of the existing charter occasioned by reason of councilmanic mal-apportionment. House Bill 101 was signed by the Governor on February 23, 1966, as an emergency measure and is now in effect.

Prior to the effective date of the new legislation the structure of the City Council of the City of Virginia Beach was in accordance with district or borough representation. As so constituted it was an obvious attempt to afford actual personal representation to areas formerly comprising the County of Princess Anne and the old City of Virginia Beach before the effective date of the merger between the County and City which was on January 1, 1963. The charter incorporating the new City of Virginia Beach was enacted

[File endorsement omitted]

by the General Assembly at its 1962 Session on the basis of agreements between the governing bodies of the consolidating area approved by popular referenda. This plan of representation was patently unconstitutional under the "one person, one vote" doctrine as enunciated by the recent decisions of the United States Supreme Court, as applied to councilmanic representation in *Ellis v. Mayor and City Council of Baltimore*, 4 Cir., 352 F.(2d) 123. It was the subject of prior memoranda filed on November 9, 1965 and December 7, 1965. Plaintiffs have now, in accordance with the suggestion of the Court, filed a supplemental complaint attacking the validity of the new statute which, for convenient reference, will be called the "Seven-Four Plan".

Princess Anne County, as it existed prior to the effective date of the merger on January 1, 1963, consisted of six [fol. 141] districts with the 1960 population stated to be as follows:

District	Population (1960)
Blackwater	733
Pungo	2504
Seaboard	7211
Kempsville	13900
Lynnhaven	23731
Bayside	29048

The various members of the Board of Supervisors of Princess Anne County served as representatives of the individual district and were elected by vote of the qualified voters registered in that district. Upon the effective date of the merger, Seaboard District became Princess Anne Borough, but in other respects the geographical boundaries remained the same. Thus Princess Anne County had six members on its Board of Supervisors prior to the formation of the new city.

The old City of Virginia Beach had five councilmen representing 8091 persons according to the 1960 census.

The area comprising the old City of Virginia Beach has been, and is now, largely dependent upon the summer tourist trade for its economic condition, although there are many fine homes throughout the area which are owned by permanent residents.

Former Princess Anne County was approximately 50% urban and 50% rural prior to the merger. The debts of the old county remained with the county under the terms of the merger; the debts of the old City of Virginia Beach remained with the people of that area. This has resulted in an unequal tax rate which continues in the boroughs of the new City of Virginia Beach.

The primary purpose of the merger was to forestall future annexation proceedings contemplated by the City of Norfolk bordering on the Kempsville and Bayside districts into which many citizens of Norfolk were gradually moving and, in addition, land for industrial development was becoming increasingly scarce in the City of Norfolk.

Irrespective of the wisdom of the merger, it has become an accomplished fact. Some pertinent facts of the new City of Virginia Beach are as follows:

1. It consists of 301.6 square miles, of which 222 square miles is made up of land and 79.6 square miles is water.
2. Bayside Borough is approximately 28 square miles in area. While at this time it still has a considerable quantity of farm land, it is essentially a suburb of the City of Norfolk devoted to residential purposes and much of the farm land has been sold for development purposes. It is, therefore, urban in character.

[fol. 142] 3. Lynnhaven Borough contains approximately 47 square miles. With the exception of some activity in the shellfish industry, Fort Story, Camp Pendleton, and the Oceana Air Base, it is likewise a residential area with predominantly urban characteristics.

4. **Kempsville Borough** is approximately 36.6 square miles. It adjoins the City of Norfolk and, while it was formerly largely rural, it is now undergoing a rapid expansion in the residential development field. Its state of transition is such that it will soon be largely urban.
5. **Virginia Beach Borough** contains only 2.4 square miles. Its urban character and great dependence upon the tourist trade has been previously noted.
6. **Princess Anne Borough** consists of 58.6 square miles. It is the former county seat of government and now houses the major administrative facilities, including the courts, serving the new City of Virginia Beach. Despite the fact that it is also in a gradual transition stage from rural to urban, it is still primarily agricultural in nature.
7. **Pungo Borough** contains 94.4 square miles of which 63 square miles is water. During World War II the government operated and maintained an airfield but this has since been abandoned. While there are beaches and bays with attractions for the hunters and fishermen, it remains essentially rural and, despite the growth in residential development, it is unlikely that any material change will be forthcoming during the next decade.
8. **Blackwater Borough**, containing 34 square miles, is agricultural and will probably remain rural for many years to come.

Faced with the problems of this heterogeneous city undergoing governmental transition and a population explosion reflected by the rapid estimated increase between

1960 and 1964¹ the city fathers approached the task of recommending a charter change to come within the constitutional ambit of the "one person, one vote" rule of law.

The new legislation denominated the "Seven-Four Plan" provides for the election of eleven councilmen with the eligible voters of the entire city voting for all candidates. Four persons are elected without regard to their place of residence within the city; the remaining seven, while elected by all voters, must reside in the particular borough and the person must state that he is running from the borough of his residence. For example, Lynnhaven, presently the largest borough in population, would be guaranteed the election of a member of the City Council residing in that borough. Lynnhaven could also have the four members elected at large without regard to residence requirement. The same is true as to Blackwater, the smallest borough. Moreover, the three smallest boroughs, Blackwater, Pungo and Princess Anne, would be assured of the election of one resident from each borough, even though the aggregate of the total population in these counties is considerably less than the population in either Kempsville, Lynnhaven or Bayside.

Plaintiffs urge that the "Seven-Four Plan" is in direct violation of the "one person, one vote" doctrine. They insist that there are only two permissible methods of electing

¹ The percentage increase of population in the various boroughs, according to figures presented by plaintiffs' expert and stated in the Court's memorandum filed December 9, 1965, reveal these approximate figures:

Borough	Percentage Population Increase from 1/1/60 to 1/1/64
Blackwater	17½%
Pungo	12 %
Princess Anne	10 %
Kempsville	60 %
Lynnhaven	59 %
Bayside	24 %
Virginia Beach	21 %

councilmen in any city—one by the familiar at-large election without regard to the place of residence within the city—the other by dividing the city into boroughs or wards of approximately even population and providing for the election of representatives within each borough or ward by the voters of that area. While the question is not free from doubt, this Court does not believe that the constitutional limitations of the “one person, one vote” rule extend that far.

In *Fortson v. Dorsey*, 379 U. S. 433, the Supreme Court considered the Georgia Reapportionment Act which permitted the counties to be divided into senatorial districts, with a proviso that a candidate had to be a resident of the district from which he sought election, but all senators within the county were subjected to a county-wide vote rather than a district vote. In reversing the three-judge federal court holding that voters of one district must join with voters of other districts in selecting a group of senators and thereby nullifying their own choice of senator, Mr. Justice Brennan said:

“It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district’s senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county’s and not merely the district’s senator.”

[Vol. 144] Thus in Blackwater Borough, if Mr. Jones and Mr. Smith declare as candidates for the City Council of the City of Virginia Beach running from the borough of their residence, all qualified voters in Virginia Beach vote

in this contest. If Jones is elected, he then represents the entire population of the City of Virginia Beach. He is the city's councilman and not merely Blackwater's councilman. And if he disregards the interests of people residing in other boroughs, his chances of survival at the next election would be indeed slight.²

It is true that under these circumstances, Blackwater, with the least population of any borough, is assured of a resident councilman. Plaintiffs point out that in *Fortson v. Dorsey*, supra, there was "substantial equality of population" among the 54 senatorial districts, whereas wide disparity exists in the boroughs of the City of Virginia Beach. The Court does not believe that this fact, standing alone, invalidates the plan. As the Supreme Court indicated, there may be instances or circumstances which will not comport with the dictates of the Equal Protection Clause where, designedly or otherwise, the plan operates to minimize or cancel out the voting strength of racial or political elements of the voting population. The record in the instant case makes no such suggestion. The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. It is significant to note, however, that under the "Seven-Four Plan" the con-

² While not a part of the record in this case, it should be noted that a Democratic Primary was held in the City of Virginia Beach on April 5, 1966, under the newly devised "Seven-Four Plan". Twelve candidates ran for the eleven available seats as Democrats. Opposition existed in only one borough where the defeated candidate, having declared for election from that borough, secured more votes in the particular borough of his residence than the successful candidate. Thus it was the city-wide vote which defeated this candidate. Another interesting sidelight is that the candidate from Pungo Borough received more city-wide votes than any of the twelve men on the ballot; Pungo being the second smallest in population of the seven boroughs comprising the City of Virginia Beach.

trol of the City Council can always be vested in the populace of Lynnhaven and Bayside, the two largest boroughs. Assuming that the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside, if united in their efforts, could elect the four councilmen without regard to residence and, together with the two councilmen residing in their respective boroughs, would have the majority control. This would also be true if all eleven councilmen were elected at-large without regard to their place of residence.

Prior to the Supreme Court's decision in *Fortson v. Dorsey*, supra, a three-judge federal court in Georgia had before it the case of *Reed v. Mann*, 237 F. Supp. 22. The judges comprising this court were the same who decided [fol. 145] *Dorsey v. Fortson*, 228 F. Supp. 259, which was later reversed *sub nom. Fortson v. Dorsey*. In *Reed* the statutory scheme for DeKalb County called for the county-wide election of five members of its governing body, with four of the members being required to be residents of the district which they offered to represent, the county being divided into four districts and with the proviso that no two members (excluding the chairman) could reside in the same district. The plan was attacked on the theory of deprivation of representative government because the county-wide vote may have overridden the will of those residing in the district. In rejecting this argument the court pointed out that the selection of a system, so long as it is not proscribed by the federal constitution, is not the business of the court. The court notes that "the political unit here involved is DeKalb County, and it is plain that every voter in the county is treated equally". So also, the City of Virginia Beach is the political unit here involved and every voter in the city is treated equally. As *Reed* states, "it is to the residents of the particular unit that the one-man, one vote rule is to be applied" and "there is no right *per se* to select representatives from any given size district or unit".

The problem presented was recently considered in *O'Shields v. McNair*, — F. Supp. —, decided February 28, 1966, by a three-judge court consisting of Chief Judge Haynsworth and District Judges Martin and Hemphill. By virtue of the South Carolina State Reapportionment Act, some small counties were guaranteed a resident senator while other counties of more than twice the population had no such protected right. Of course, unlike the issue here presented, the senatorial candidates were not elected by the voters of the entire state and hence, when elected, became the senator from a particular county or, in multi-county districts, the voters cast their ballots on each senatorial candidate whether the candidate resided in that county or not, and such successful candidate was designated as the representative of the particular district. In discussing the related problem, Chief Judge Haynsworth had this to say:

"We are also aware of the fact that a number of municipalities in this state elect their councils under ward-residence rules. Each electoral contest is framed by opposition between residents of the same ward, but the election is determined by the results of city-wide voting. We may assume that in some of those cities, particularly those which have been operating under that system for a long time, some wards may vary greatly in population.

"We may also assume the general constitutionality of such municipal election schemes, but that does not dispose of the present problem. Here there is no supporting history, and the record furnishes no basis for a finding of a compelling need for resident Senators in some small counties but not in other counties of comparable size and in still others much larger."

[fol. 146] In contrast, the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least

during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wise cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The "Seven-Four Plan" is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster. *Fortson v. Dorsey*, supra.

What must not be overlooked is the fact that each borough will have one or more candidates for the City Council; they are elected by all of the voters of the city to represent the entire city, not merely the borough wherein they reside. If their election was otherwise, the "Seven-Four Plan" would be constitutionally impermissible. The four members elected at-large without regard to residence would, under normal circumstances, be from the more heavily populated boroughs. The fact that three of the eleven council members must come from the less populated boroughs does not, standing alone, amount to invidious discrimination where they are elected by the voters of the entire city.

The complaint and supplemental complaint will be dismissed. As the plaintiffs substantially prevailed in the initial phase of this litigation, and the defendants have

prevailed in the later proceeding, each party will bear its own costs. Counsel for the defendants will prepare and present an appropriate decree after affording an opportunity for inspection and endorsement by counsel for the plaintiffs.

Walter E. Hoffman, United States District Judge.

Norfolk, Virginia

April 8th, 1966

[fol. 147]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

J. E. CLAYTON DAVIS, et al., Plaintiffs,

vs.

FRANK A. DUSCH, et al., Defendants.

FINAL DECREE—April 14, 1966

For reasons stated in a Memorandum filed herein on April 8, 1966, it is Adjudged, Ordered and Decreed that the Complaint, Amended Complaint and Supplemental Complaint herein are dismissed and the relief sought by the plaintiffs therein is denied; and

It is further Ordered that plaintiffs' motion for an interim injunction and stay pending appeal be and the same hereby is denied; and

It is further Adjudged, Ordered and Decreed that each party will bear his own costs, to which action of the Court the plaintiffs duly noted their exception.

[File endorsement omitted]

Walter E. Hoffman, United States District Judge,
Norfolk, Virginia
April 14, 1966

Henry E. Howell, Jr., Of counsel for Plaintiffs.

Harry T. Marshall, Of counsel for Defendants.

[fol. 148] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 149]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,592

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D.
SCULLY, and HOWARD W. MARTIN, Appellants,

versus

FRANK A. DUSCH, Member, City Council, City of
Virginia Beach, et al., Appellees.

Appeal from the United States District Court for the
Eastern District of Virginia, at Norfolk. Walter E. Hoff-
man, Chief District Judge.

Argued May 4, 1966.

Before Boreman, Bryan and Bell, Circuit Judges.

OPINION—Filed and Entered May 30, 1966

[fol. 150] Henry E. Howell, Jr., (Howell, Anninos &
Daugherty on brief) for Appellants, and Harry Frazier,
III, (Harry T. Marshall, City Attorney, Virginia Beach,
Virginia, and Hunton, Williams, Gay, Powell & Gibson on
brief) for Appellees.

Albert V. Bryan, Circuit Judge:

Apportionment of councilmen of the City of Virginia Beach, Virginia, among its seven boroughs presents this controversy. The original allocation in the city charter was annulled by the District Court in an earlier proceeding¹, as denying the electorate one-person-one-vote equality². The charter was then amended by the General Assembly of Virginia, in the January-March 1966 session to provide a new plan.³ To a renewed attack on the same ground, the District Court held the present pattern impregnable. The holding is now appealed and this court reverses.

The contested allotment of members of the council, the governing body of the city, is commonly known as the Seven-Four plan. It provides for 11 councilmen, *all to be selected by the qualified voters throughout the entire city.* [fol. 151] However, 7 members are apportioned among 7 boroughs, one to each borough who must be a resident of that borough. The remaining 4 members are assigned to the city at large and may reside anywhere within its corporate limits.

The boroughs, their respective sizes and populations are as follows:

Area in Square Miles	Borough	1960 Population
34	Blackwater	733
94.4	Pungo	2,504
58.6	Princess Anne	7,211
36.6	Kempsville	13,900
47	Lynnhaven	23,731
28	Bayside	29,048
2.4	Virginia Beach	8,091

¹ Davis et al. v. Dusch et al.; (E.D.Va.), unreported opinions of 3-judge court dated Nov. 9, 1965 and of single judge dated Dec. 7, 1965.

² Davis v. Mann, 377 US 678 (1964); Ellis v. Mayor and City Council of Baltimore, 352 F2d 123 (4 Cir. 1965).

³ Acts of General Assembly, 1966, ch. 39, p. 89, H.B. 101, approved Feb. 23, 1966.

The present City of Virginia Beach is the result of a consolidation on January 1, 1963 of the previous city of that name and the adjoining Princess Anne County. At that time the County was divided into 6 magisterial districts corresponding with, and having the same names as, the present boroughs, except that the borough of Princess Anne was formerly Seaboard District. Each district elected a supervisor, and these 6 supervisors constituted the governing County Board of Supervisors. The old City of Virginia Beach had 5 councilmen. The new City's council membership was a combination of the 6 former County supervisors and the 5 former councilmen. How- [fol 152] ever, as will have been noted, 5 councilmen of the old city are now disposed as follows: to the Virginia Beach borough 1 and to the new city at large 4.

The earlier city was, as is now the borough of Virginia Beach, an oceanside resort looking mainly to summer tourists for its economy. Princess Anne County was formerly half urban and half rural. The new city encompasses about 301.6 square miles, of which 79.6 is water. As found by the District Court, the boroughs are generally of the following character:

Blackwater is agricultural and is expected to continue so for many years.

Pungo is "essentially rural".

Princess Anne, formerly the county seat and now containing the administrative agencies and the State courts, is "still primarily agricultural in nature".

Kempsville is changing rapidly from rural to urban.

Lynnhaven is "a residential area with predominantly urban characteristics".

Boyside "has a considerable quantity of farm land" but as a suburb of the City of Norfolk many of its tracts have been developed for residential occupancy, and the borough has taken on an urban complexion.

Virginia Beach as a borough continues to be a seaside resort as it has always been.

[fol. 153] To sustain the 7-4 formula, substantial reliance is put in the requirement in the 1966 Act that the city-wide voters elect all the councilmen. Thus it is stressed, the ballots of voters in the smaller boroughs are not accorded greater weight than those cast in the larger boroughs; the small-borough voter's ballot is not more effective in electing a councilman than that of the large-borough elector. Correspondingly, the value of the larger-borough vote does not exceed the smaller-borough vote. The one-person-one-vote mandate is thus purportedly obeyed.

But full compliance with the 14th Amendment's Equal Protection Clause, we think, is still wanting. The principle of one-person-one-vote extends also to the level of representation, and exacts approximately equal representation of the people—that each legislator, State or municipal, represent a reasonably like number in population. But that is not achieved in the 7-4 plan; the imbalance in representation in the council is obvious.

For example, Blackwater containing 733 people will have the same assured representation as the borough of Lynnhaven with 23,731 persons, or Bayside with 29,048, or Kempsville with 13,900. Similar contrasts are evident. This disparateness is not cured by the city-wide election provision. "It is the distribution of . . . [members] rather than the method of distributing . . . [them] that must satisfy the demands of the Equal Protection Clause". *Burns v. Richardson*, 34 U.S.L. Week 4365, 4366 fn. 4 (U.S. April 25, 1966).

Nor is this unequivalence of representation evened by the stipulation for 4 at-large councilmen to represent all of the boroughs. Their election would in no circumstances [fol. 154] equalize the representation of the larger boroughs with that of the smaller. True, Lynnhaven and Bayside as the two largest boroughs population-wise could, if they collaborated, elect all of the 4 members. However, if

each elected 2, and even if these were considered as in actuality councilmen of that borough alone, giving it 3 members, the numerical representation per councilman would be far greater than that of Blackwater's member or Pungo's. Indeed, this would be so if all 4 at-large councilmen came from the largest borough, Bayside. Consequently, to repeat, the provision for 4 city-wide members does not remedy or in any way affect the disproportion of representation of the 7 borough members.

That equal representation is embraced in the Constitutional demand, epitomized as the rule of one-person-one-vote, is comprehensively expounded by Judge Sobeloff for this court in *Ellis v. Mayor and City Council of Baltimore*, 352 F2d 123 (4 Cir. 1965). Importantly, the case's subject is fairness in drawing councilmanic election wards and the Constitutional criteria therefor. The opinion demonstrates, *passim*, that the "true thrust" of *Reynolds v. Sims*, 377 US 533 (1964) and its kin—*WMCA, Inc. v. Lomenzo*, 377 US 633; *Maryland Committee v. Tawes*, 377 US 656; *Davis v. Mann*, 377 US 678; *Roman v. Sincock*, 377 US 695; and *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 US 713—is that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, *without regard to race, sex, economic status, or place of residence within a State*". (Accent added.) 352 F2d at 128. A city council was there analogized to a State legislature with the admonition that "seats in both houses . . . must be apportioned substantially on a population basis". *Id.* at 129. This distillation would only be watered down by further disquisition or by a rehearsal of the pat quotations the opinion takes from these precedents.

Fortson v. Dorsey, 379 US 433 (1965), cited to sustain the validity of the instant plan, finds acceptable only half of the present design. No fault was found there in the choice of State senators in a multi-district county by a county-wide electorate, with the requirement that each sen-

ator be a resident of one of the districts. True, this scheme finds a parallel in the City of Virginia Beach's charter provision. But there the resemblance ends. In *Fortson* the Court significantly contracted its approval to the method of selection. It explicitly noted the absence of any substantial inequality among the districts. Had there been a vast disparity, such as Blackwater's 733 to Bayside's 29,048, it is not readily conceivable that the Court would have given its endorsement. In *O'Shields et al. v. McNair et al.* (D.S.C. 3-judge court, Feb. 28, 1966) Chief Judge Haynsworth of this court, writing the opinion, termed the substantial population equality of the districts in *Fortson* as "crucial". We agree.

Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give, or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in representation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan. Manifestly, the discussion in *Fortson v. Dorsey*, *supra*, 379 US 433, 438 seemingly discounting the fear of sectionalism in a district's legislator was conditioned upon "substantial equality of population" among the legislative districts there.

Moreover, confessedly, the Virginia Beach plan was proposed, and drafted with an eye, to include in the makeup of the council the representation of the peculiar interests of each borough. It was architected to give voice to the agricultural or non-urban concerns of the smaller bor-

oughs. However understandable, reasons of this kind may not be counted in appraising the Constitutionality of an apportionment. *Reynolds v. Sims*, 377 US 533, 562 (1964); *Ellis v. Mayor and City Council of Baltimore*, *supra*, 352 F2d 123, 128.

Unless enjoined, the 1966 apportionment will control in the next general election of councilmen, now scheduled by general statute for June 14, 1966. It governed in a primary election on April 5, 1966 for the nomination of candidates in the general election. Protestants of the plan ask us to enjoin its further employment, and to order that the June election be held on the basis of a selection of all 11 councilmen from the city at large. However, we think such decrees would be an unneeded disturbance of municipal affairs at this time.

[fol. 157] Therefore, the election will be allowed to proceed without delay. The successful candidates will be permitted to organize and serve as the council of the City of Virginia Beach until the next session, whether special or regular, of the General Assembly of Virginia. If no reapportionment is then made of the councilmen, the District Court shall set aside the current apportionment and order an election of the councilmen at large or realign the boroughs so as to equalize substantially their populations.

Counsel fees will not be awarded the protestants, but the City of Virginia Beach will be ordered to pay the costs in the trial court and on appeal. This case will be remanded to the District Court with directions to retain jurisdiction and to proceed in accordance with the views herein expressed.

Reversed and remanded.

[fol. 158]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,592

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D.
SCULLY and HOWARD W. MARTIN, Appellants,

vs.

FRANK A. DUSCH, Member, City Council, City of
Virginia Beach, et al., Appellees.

Appeal from the United States District Court for the Eastern
District of Virginia.

This cause came on to be heard on the record from the
United States District Court for the Eastern District of
Virginia, and was argued by counsel.

JUDGMENT—May 30, 1966

On consideration whereof, It is now here ordered and
adjudged by this Court that the judgment of the said Dis-
trict Court appealed from, in this cause, be, and the same
is hereby, reversed with costs; and that this cause be, and
the same is hereby, remanded to the United States Dis-
trict Court for the Eastern District of Virginia, at Norfolk,
for further proceedings consistent with the opinion of the
Court filed herein.

Albert V. Bryan, United States Circuit Judge.

[File endorsement omitted]

[fol. 159]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,592

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D.
SCULLY and HOWARD W. MARTIN, Appellants,

v.

FRANK A. DUSCH, Member, City Council, City of
Virginia Beach, et al., Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed August 26, 1966

I. Notice is hereby given that Frank A. Dusch, Member, City Council, City of Virginia Beach, et al., the appellees above named, hereby appeal to the Supreme Court of the United States from an order entered herein on May 30, 1966, declaring unconstitutional the apportionment of the members of the city council of the City of Virginia Beach, Virginia, and remanding the case to the United States District Court for the Eastern District of Virginia for further action if the General Assembly of Virginia at its next session should fail to reapportion.

This appeal is taken pursuant to 28 U.S.C.A. § 1254(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all documents and papers pertaining to this cause filed in this Court.

[File endorsement omitted]

III. The following questions are presented by this appeal:

[fol. 160] (1) Whether the doctrine of "one person, one vote," as enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964) and subsequent decisions for apportionment of members of state legislatures, also applies to the apportionment of members of a city council among the several boroughs or wards of a city.

(2) If such doctrine does apply, whether the "seven-four plan" prescribed by the charter of the City of Virginia Beach, Virginia (Ch. 147, Acts of Assembly of 1962, as amended by Ch. 39, Acts of Assembly of 1966) for the election of councilmen violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Archibald G. Robertson, Attorney for Frank A. Dusch, et al.

Harry T. Marshall, City Attorney, Courthouse Drive, Princess Anne Station, Virginia Beach, Virginia 23456.

Archibald G. Robertson, Harry Frazier, III, Hunton, Williams, Gay, Powell & Gibson, 1003 Electric Building, Richmond, Virginia 23212.

Certificate of Service (omitted in printing).

[fol. 162] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 163]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 10,592

**J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D.
SCULLY and HOWARD W. MARTIN, Appellants,**

vs.

**FRANK A. DUSCH, Member, City Council, City of
Virginia Beach, et al., Appellees.**

ORDER EXTENDING TIME—Filed October 26, 1966

On motion of Frank A. Dusch et al., made on October 25, 1966, and without objection by J. E. Clayton Davis et al., for good cause shown, it is ordered that pursuant to section 13(1) of the Revised Rules of the Supreme Court of the United States the 60-day period for docketing this case on appeal to the Supreme Court of the United States by Frank A. Dusch et al., be, and it is hereby, extended for a period of seven (7) days.

The Clerk of this Court shall certify a copy of this order to the Clerk of the Supreme Court of the United States.

Albert V. Bryan, United States Circuit Judge.

[File endorsement omitted]

[fol. 164]

SUPREME COURT OF THE UNITED STATES

No. 724—October Term, 1966

FRANK A. DUSCH, et al., Appellants,

v.

J. E. CLAYTON DAVIS, et al.

**Appeal from the United States Court of Appeals for the
Fourth Circuit.**

ORDER POSTPONING JURISDICTION—January 9, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. The case is placed on the summary calendar and set for oral argument immediately following No. 491. In addition to the merits of the case, counsel are directed to brief and present oral argument on the question of whether a three-judge court should have been convened.

OCT 26 1966

NO. 724

JAMES T. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1966

FRANK A. DUSCH, ET AL.,*Appellants,*

v.

**J. E. CLAYTON DAVIS, ROLLAND D. WINTER,
CORNELIUS D. SCULLY AND HOWARD W. MARTIN,***Appellees.*

On Appeal from the United States Court of Appeals
for the Fourth Circuit

JURISDICTIONAL STATEMENT

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Reynolds v. Sims, 377 U.S. 533 (1964)	2, 3, 8, 10, 16, 17
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Sailors v. Board of Education, 254 F. Supp. 17 (W.D. Mich. 1966), appeal docketed, 35 U.S.L. Week 3072 (Aug. 10, 1966) (No. 430)	10, 12
WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964)	3

Other Authorities

Acts of Assembly of Virginia, 1962, Ch. 147	3
Acts of Assembly of Virginia, 1966, Ch. 39	3
Annotation, Inequalities in Population of Election Districts or Voting Units as Rendering Apportionment Unconstitutional, 12 L. ed 2d 1282 (1965)	14, 15
Code of Virginia, Article 4, Chapter 26, Title 15.1	6
28 U.S.C. § 1254(2), § 1343(3)	2
42 U.S.C. § 1983, § 1988	2

IN THE
Supreme Court of the United States

October Term, 1966

NO. _____

FRANK A. DUSCH, ET AL.,

Appellants,

v.

**J. E. CLAYTON DAVIS, ROLLAND D. WINTER,
CORNELIUS D. SCULLY AND HOWARD W. MARTIN,**

Appellees.

On Appeal from the United States Court of Appeals
for the Fourth Circuit

JURISDICTIONAL STATEMENT

Appellants, Frank A. Dusch, et al.,* appeal from a judgment entered May 30, 1966, by the United States Court of Appeals for the Fourth Circuit declaring the statute apportioning the members of the city council unconstitutional as repugnant to the Equal Protection Clause of the Fourteenth Amendment. Appellants submit this

* Appellants consist of the following officials of the City of Virginia Beach, Virginia: eleven members of the city council, three members of the electoral board, treasurer, commissioner of revenue and two members of the state legislature.

Jursidictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 361 F. 2d 495 (4th Cir. 1966) and is printed in the Appendix as App. 1 to 7. The judgment of that court appears as App. 8. The memorandum opinion of the United States District Court for the Eastern District of Virginia, which was reversed by the United States Court of Appeals, appears as App. 9 to 19.

Included in the Appendix are opinions of the United States District Court in earlier phases of the case which are considered relevant to this appeal. They appear as App. 20 to 24 and 25 to 28.

JURISDICTION

This suit was brought to have declared unconstitutional a state statute relating to the apportionment of the Virginia Beach city council and to enjoin the holding of councilmanic elections pursuant thereto. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. §§ 1983, 1988.

The opinion of the Court of Appeals was filed on May 30, 1966, and its judgment reversing and remanding to the District Court was entered on the same date. A notice of appeal was filed in the Court of Appeals on August 26, 1966. Jurisdiction of this appeal is conferred on the United States Supreme Court by 28 U.S.C. § 1254(2). The following representative cases sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Burns v. Richardson*, 384 U.S. 73 (1966); *Reynolds*

v. Sims, 377 U.S. 533 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Davis v. Mann*, 377 U.S. 678 (1964).

QUESTIONS PRESENTED

(1) Whether the doctrine of "one person, one vote," as enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964) and subsequent decisions for apportionment of members of state legislatures, also applies to the apportionment of members of a city council among the several boroughs or wards of a city.

(2) If such doctrine does apply, whether the "Seven-Four Plan" prescribed by the Charter of the City of Virginia Beach, Virginia (Ch. 147, Acts of Assembly of 1962; as amended by Ch. 39, Acts of Assembly of 1966) for the election of councilmen results in such invidious discrimination as to violate the Equal Protection Clause of the Fourteenth Amendment.

STATUTES INVOLVED

The statutes involved are Sections 3.01 and 3.02 of the Charter of the City of Virginia Beach, Virginia, establishing the Seven-Four Plan of election of city councilmen, being a portion of Chapter 39 of the Acts of Assembly of 1966:

"§ 3.01 COMPOSITION. The City shall be divided into seven boroughs. One of such boroughs shall comprise the city of Virginia Beach as existing immediately preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the re-

maining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the the city at large.

"§ 3.02 ELECTION OF COUNCILMEN. On the second Tuesday in June in 1966 and on the second Tuesday in June of every fourth year thereafter, there shall be a general election at which the qualified voters of the city shall elect eleven councilmen for terms of four years beginning on the first day of September next following the date of their election and until their successors are duly elected and qualified. Each candidate shall state whether he is running at large or from the borough of his residence, but otherwise, candidates shall be nominated under general law. Election and qualification of councilmen in nineteen hundred sixty-six shall terminate the terms of all incumbent councilmen even though they may have been elected for longer terms."

STATEMENT OF THE CASE

The present City of Virginia Beach came into being on January 1, 1963, when Virginia Beach, a resort city having an area of 2.4 square miles and a 1960 population of 8,091, consolidated with adjoining Princess Anne County, having an area of almost 300 square miles and a 1960 population of 77,121. In terms of area it is one of the largest cities in the United States.

Two things characterize Virginia Beach today—its explosive growth and its heterogeneous physical and economic composition. Total population increased from 85,218 at the

1960 census to an estimated 118,139 in 1964, an overall increase of 40% in four years.*

The city is divided into seven boroughs, of which six correspond with the magisterial districts of the former county and one with the former city. These boroughs, their respective sizes and populations are as follows:

<i>Borough</i>	<i>Area-Sq. Mi.</i>	<i>Population</i>	
		<i>1960</i>	<i>1964(est.)</i>
Virginia Beach	2.4	8,091	10,473
Bayside	28	29,048	36,027
Blackwater	34	733	862
Kempsville	36.6	13,900	22,254
Lynnhaven	47	23,731	37,760
Princess Anne	58.6	7,211	7,957
Pungo	94.4	2,504	2,806

The three boroughs to the north (Bayside, Kempsville and Lynnhaven) are primarily urban. Their large residential areas house persons employed in the adjoining City of Norfolk and at the numerous nearby military installations. These boroughs also contain most of the city's commercial and industrial areas as well as its potential for future development of this character. The three boroughs to the south (Blackwater, Princess Anne and Pungo) are primarily rural and are destined to remain that way. Agriculture is the dominant industry but substantial areas are devoted to recreational uses. The borough of Virginia Beach is centered almost entirely around its famous ocean beach and the tourist industry.

* According to figures just released, Virginia Beach now has an estimated population of 131,860. *Estimate of the Population of the Counties and Cities of Virginia as of July 1, 1966*, Bureau of Population and Economic Research, University of Virginia, Charlottesville, Virginia, October 19, 1966.

The consolidation was effected by vote of the people in both the old city and county pursuant to Article 4, Chapter 26, Title 15.1, Code of Virginia of 1950, as amended, and by the granting of a charter by the General Assembly of Virginia. A borough form of government was selected. This permitted the levy of higher taxes in those areas desiring more governmental services than were desired in the city as a whole. A cornerstone of the plan was the election of a councilman from each borough to represent the needs of its citizens. The initial council had eleven members. The borough of Virginia Beach continued to elect five councilmen from the borough at large and the six boroughs comprising the former magisterial districts of the county continued to elect one representative each. This was an interim plan designed to rally the support of voters in a new city half rural and half urban and required the initiation of a new system of representation after 1968.

J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, plaintiffs below and appellees here (herein referred to as "Voters"), filed a complaint in the United States District Court for the Eastern District of Virginia against Frank A. Dusch and others, being city councilmen and other city officials (herein referred to as "Officials"), seeking the convening of a three judge court to declare unconstitutional that plan for the election of councilmen and to grant various injunctive relief. Following a decision by the three judge court ordering its dissolution (App. 25 to 28), the district judge, to whom the case was referred, held on December 7, 1965, that the existing apportionment was unconstitutional as violating the doctrine of "one person, one vote" (App. 20 to 24). That court stayed further proceedings to allow the city an opportunity to seek a charter amendment at the 1966 session of the state legislature.

The General Assembly of Virginia amended the Virginia Beach city charter on February 23, 1966, to provide for the election of councilmen under the Seven-Four Plan (Ch. 39, Acts of Assembly of 1966). According to that plan, eligible voters throughout the city vote for all eleven councilmen. Seven are elected by the voters of the entire city, one being required to reside in each of the seven boroughs, and four are elected by the voters of the entire city without regard to residence.

This plan was selected to guarantee that persons having a knowledge of rural problems would sit on the council. Three of seven boroughs are predominantly rural and agriculture is still the city's largest industry. While it was felt that traditional at large elections would come in time, the Seven-Four Plan was considered to be the best form of government for a unique and heterogeneous city during a period of continued growth and transition.

Pursuant to leave granted them by the December 7, 1965, order of the District Court, Voters filed a supplemental complaint challenging the validity of the Seven-Four Plan and seeking an injunction against an election to be held thereunder. On April 8, 1966, the District Court held that the Seven-Four Plan did not violate the doctrine of "one person, one vote" and dismissed the original and supplemental complaints (App. 9 to 19).

On appeal to the United States Court of Appeals for the Fourth Circuit, that court on May 30, 1966, reversed. While refusing to enjoin an election scheduled for June 14 under the Seven-Four Plan, the Court of Appeals remanded the case to the District Court with instructions to set aside the current apportionment and order an election at large or realign the boroughs so as to equalize substantially their population if no reapportionment is made at the next ses-

sion of the General Assembly. It is from this opinion and accompanying judgment of the Court of Appeals that this appeal has been taken.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important questions in an area in which this Court has never spoken.

This Court has repeatedly made it clear that the Equal Protection Clause of the Fourteenth Amendment requires the apportionment of Congressional and state legislative districts in accordance with the doctrine of "one person, one vote." Yet, it has never decided whether this doctrine applies to the myriad units of local government.

If this Court should extend the "one person, one vote" principle to local government, it must then determine whether the same standards promulgated for apportioning state legislatures must be observed in the vastly different area of local legislative bodies.

"One Person, One Vote" and Local Government

From the decided cases the courts are not clear whether the doctrine of "one person, one vote" as enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964) and other state legislative cases also applies to local levels of government such as counties, cities, towns and various local boards and commissions. For example, in *Detroit Edison Co. v. East China Township School Dist. No. 3*, 247 F. Supp. 296, 300 (E.D. Mich. 1965), the court said:

"Much uncertainty surrounds the effect of the reapportionment decisions on local government. A threshold question is whether the equal protection clause applies to any municipal problems, even reapportionment of representative legislative bodies.

"The Supreme Court has not specifically extended the application of the equal protection clause beyond the composition of state legislatures and justiciability may well be limited to the state. Some lower courts have held that the equal protection clause does not extend to local units of government, . . . others that it does apply, . . . and still others have assumed it extends without fully discussing this issue, . . ."

In *Johnson v. Genessee County, Michigan*, 232 F. Supp. 567, 572. (E.D. Mich. 1964), a federal district court held that neither the federal constitutional provision guaranteeing every state a republican form of government nor the Fourteenth Amendment requires districting of local legislative bodies on the basis of population:

"Under the prevailing view of the United States Supreme Court, as we have pointed out above, the composition of local units of government is held to be a state matter. Under the rule of stare decisis, this Court is not free to consider the subject of the apportionment of representation on local legislative bodies. It may well be that the time will come when the application of the Fourteenth Amendment will be extended that far. The more likely development is that the June 15, 1964, rulings of the Supreme Court in cases dealing with the state legislatures of Alabama, New York, Maryland, Delaware, Virginia, and Colorado will result in legislatures in our states which will be proportionately representative of people, and therefore, likely to themselves establish in local legislative bodies a vastly different balance between people and governmental power."

More recently, the United States District Court for the Middle District of Alabama has taken the position that the doctrine does not apply to local governmental units. *Moody*

v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966), *appeal docketed*, 35 U.S.L. Week 3130 (Oct. 3, 1966) (No. 624).

In the words of that court, "The numerical imbalance demonstrated by simple statistics falls far short of proving invidious discrimination." The court went on to state that so long as the people of a state are afforded equal protection through equality of representation in the state legislature, the courts should not interfere with representation on the lesser levels of government which have been created by and derive their powers from that legislature.

In *Sailors v. Board of Education*, 254 F. Supp. 17, 29 (W.D. Mich. 1966), *appeal docketed*, 35 U.S.L. Week 3072 (Aug. 10, 1966) (No. 430), which held "one man, one vote" not applicable to the apportionment of school districts in Michigan, the court said:

"We recognize that the Supreme Court of the United States may at some time in the future reach the conclusion that the District Courts of the United States have the power and duty to prescribe guide lines for the selection of the many boards and commissions created and organized in connection with local government. We are satisfied that the Supreme Court of the United States has not yet reached that point. We are satisfied that we should not anticipate that the Supreme Court will reach that point."

The distinction made in these cases between applicability of "one man, one vote" at the local as opposed to the state level of government draws strong support from Mr. Chief Justice Warren speaking in *Reynolds v. Sims*, 377 U.S. 533, 575 (1964):

"Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been tradi-

tionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 US 161, 178, 52 L ed 151, 159, 28 S Ct 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the state.' . . ."

There are cogent reasons for this Court to hold now that the doctrine does not extend beyond the apportionment of state legislatures to local government. Municipalities have no inherent sovereignty except as provided in state constitutions. They are creatures of the state and, as such, are subject to complete control by the state. Its legislature, in the exercise of its authority over units of local government, could provide, without violating the Constitution, that local officials be appointed by the state instead of being elected by the voters. The Federal judiciary should not become involved in the apportionment of the innumerable county, city and town governing bodies and the local boards and agencies which exercise legislative or quasi-legislative functions.

In *Griffing v. Bianchi*, 382 U.S. 15 (1965), this Court refused to review the decision of a three judge court which held that the Equal Protection Clause applied to the apportionment of the Suffolk County, New York Board of Supervisors. This Court dismissed the appeal "for want of jurisdiction." One court has construed the dismissal as a limitation by this Court of the Equal Protection Clause. *Detroit Edison Co. v. East China Township School Dist. No. 3*, *supra*, 247 F. Supp. 296, 300-01 (E.D. Mich. 1965):

The question of the applicability of the doctrine of "one person, one vote" at local levels of government is squarely presented on this appeal. The same question is also being presented in *Moody v. Flowers*, 256 F. Supp. 195 (M.D. Ala. 1966), *appeal docketed*, 35 U.S.L. Week 3130 (Oct. 3, 1966) (No. 624) and *Sailors v. Board of Education*, 254 F. Supp. 17 (W.D. Mich. 1966), *appeal docketed*, 35 U.S.L. Week 3072 (Aug. 10, 1966) (No. 430). Local governing officials throughout the country are waiting for clarification of the matter.

The Seven-Four Plan Accords with "One Person, One Vote"

The Seven-Four Plan is a true hybrid and its uniqueness makes this a case of first impression. This is not the typical case in which areas having unequal populations have the same amount of representation, thus giving one vote in the smaller area greater value than one vote in the larger area. Under the Seven-Four Plan, there is no such dilution of votes. Every vote in Virginia Beach counts equally since all candidates are elected by a city-wide vote.

In ruling that the guarantee of resident councilmen to the three least populous boroughs fails to comply with the Equal Protection Clause, the Court of Appeals ignored the very heart of the Seven-Four Plan. Although seven of the eleven councilmen must reside in the boroughs of their residence, they are representatives of the entire city, not just of their respective boroughs, because they are elected by and are responsible to the voters of the entire city.

The point is illustrated in *Fortson v. Dorsey*, 379 U.S. 433 (1965), where this Court upheld a residence requirement for the election of state senators in Georgia in a multi-district county. There, as here, all elected representatives within the county were subject to a vote of the entire

county. As stated by Mr. Justice Brennan, they were the elected representatives of the entire county, not merely the district of their residence:

"It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. . . ." (379 U.S. at 438)

Admittedly, the reason for the Seven-Four Plan is to insure that the city council will always include *some* persons familiar with the rural point of view. This is important because the agriculture of the three sparsely populated boroughs constitutes the city's largest industry and the problems of rural areas differ from those of urban centers. Yet, so long as the city council is subject at all times to the control of the majority, any favoritism which may be charged, is unconvincing.

The fundamental fairness of the Seven-Four Plan is illustrated by the following excerpts from the District Court's opinion:

"As the Supreme Court indicated, there may be instances or circumstances which will not comport with the dictates of the Equal Protection Clause where, designedly or otherwise, the plan operates to minimize or cancel out the voting strength of racial or political elements of the voting population. The record in the

instant case makes no such suggestion. The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. . . ." (App. 15-16).

* * *

"... the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wise cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. . . ." (App. 18)

To strike down the Seven-Four Plan as being invidiously discriminatory is tantamount to saying that there are only two permissible methods of electing city councilmen—one by the familiar at large election without regard to residence and the other by and from districts or wards of substantially equal population. Use of either method would have bizarre results at Virginia Beach for the very reasons pointed out in an annotation entitled "Inequalities in Population of

Election Districts or Voting Units as Rendering Apportionment Unconstitutional," 12 L. Ed. 2d 1282 (1965).

While a system of traditional at large elections without regard to residence admittedly passes all constitutional tests, it would not be acceptable at Virginia Beach. In the language of the annotation, such a system promotes the denial of representation of minority interests. The two boroughs with a majority of the population could easily elect all eleven councilmen. This would not be so important in the average city because all of its problems are apt to be essentially urban in nature. But with its 300 square miles consisting of relatively small urban centers, extensive suburban development and vast agricultural and undeveloped areas, Virginia Beach is unique. This rapidly growing and changing new city cannot afford to take the chance that none of its councilmen will be familiar with its major industry and the related problems of the rural sections which comprise more than half its area.

District or ward elections solve these problems but create others. How to district the city is complicated by the population explosion. When two boroughs show a 60% population growth in just four years, it is obvious that ward elections cannot keep up with the demographic changes being experienced here.

The Seven-Four Plan was designed to meet the needs of a unique situation. It combines the best elements of at large and ward elections in a way that insures a free and effective vote for all while permitting an intelligent expression on the council of views relating to every phase of the city's varied life.

Voters have seized on the egalitarian appeal of the slogan "one person, one vote" and argue that it represents an unyielding mandate of this Court requiring an absolute

adherence to strict population standards. The Court of Appeals for the Fourth Circuit seems to agree. But this position misses in part the teaching of *Reynolds*:

"Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." (377 U.S. at 560-561)

In *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123, 126 (4th Cir. 1965), it was recognized that departures from the standard will be permitted where based on specific proof of permissible considerations, but not on vague generalities. In finding the South Carolina senate reapportionment plan invalid, a three judge court stated in *O'Shields v. McNair*, 252 F. Supp. 708, 715 (D.S.C. 1966):

"It may be that after extended evidentiary hearings, the state might be able to justify the apportionment or the negative residence clause, or both. We only hold that justification of either is not now clearly apparent on this record."

We deny that the Seven-Four Plan departs from the basic standard of equality among voters required by *Reynolds* and related state legislative apportionment cases. However, if we concede such departure for the sake of argument, the reasons therefore, as described above, are entirely proper.

This Court recognizes that the type of government may be considered in evaluating the constitutionality of deviations from a strict population standard. It has expressly declared in *Reynolds* that "distinctions may well be made between congressional and state legislative representation" and, accordingly, "somewhat more flexibility may therefore be constitutionally permissible with respect to legislative apportionment." (377 U.S. at 578).

More flexibility should be allowed local governments than state legislatures. There is such a variety of local units exercising varying powers. And the variety of local conditions is even greater. Surely, this Court did not intend to place local governments in a straight jacket, as the Court of Appeals has done here, by an automatic application of the same standards imposed on the states by *Reynolds* and related state apportionment decisions.

CONCLUSION

The questions presented by this appeal are substantial and are of far-reaching public importance to many levels of local government. This Court should note probable jurisdiction and hear full argument of this appeal, either alone or in conjunction with the other pending cases presenting similar questions.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,592.

J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully
and Howard W. Martin,

Appellants,

versus

Frank A. Dusch, Member, City Council, City of Virginia
Beach, et al.,

Appellees.

Appeal from the United States District Court for the
Eastern District of Virginia, at Norfolk
Walter E. Hoffman, Chief District Judge

(Argued May 4, 1966. Decided May 30, 1966.)

Before BOREMAN, BRYAN and BELL, Circuit Judges.

Albert V. Bryan, Circuit Judge:

Apportionment of councilmen of the City of Virginia Beach, Virginia, among its seven boroughs presents this controversy. The original allocation in the city charter was annulled by the District Court in an earlier proceeding,¹ as denying the electorate one-person-one-vote equality.²

¹*Davis et al. v. Dusch et al.*, (E.D. Va.), unreported opinions of 3-judge court dated Nov. 9, 1965 and of single judge dated December 7, 1965.

²*Davis v. Mann*, 377 U.S. 678 (1964); *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123 (4 Cir. 1965).

App. 2

The charter was then amended by the General Assembly of Virginia in the January-March 1966 session to provide a new plan.³ To a renewed attack on the same ground, the District Court held the present pattern impregnable. The holding is now appealed and this court reverses.

The contested allotment of members of the council, the governing body of the city, is commonly known as the Seven-Four plan. It provides for 11 councilmen, *all to be selected by the qualified voters throughout the entire city*. However, 7 members are apportioned among 7 boroughs, one to each borough who must be a resident of that borough. The remaining 4 members are assigned to the city at large and may reside anywhere within its corporate limits.

The boroughs, their respective sizes and populations are as follows:

Area in Square Miles	Borough	1960 Population
34	Blackwater	733
94.4	Pungo	2,504
58.6	Princess Anne	7,211
36.6	Kempsville	13,900
47	Lynnhaven	23,731
28	Bayside	29,048
2.4	Virginia Beach	8,091

The present city of Virginia Beach is the result of a consolidation on January 1, 1963 of the previous city of that name and the adjoining Princess Anne County. At that time the County was divided into 6 magisterial districts corresponding with, and having the same names as, the present boroughs, except that the borough of Princess Anne was formerly Seaboard District. Each district elected a

³Acts of General Assembly, 1966, ch. 39, p. 89, H.B. 101, approved February 23, 1966.

supervisor, and these 6 supervisors constituted the governing County Board of Supervisors. The old city of Virginia Beach had 5 councilmen. Thus the initial council membership was a combination of the 6 former County supervisors and the 5 former councilmen. However, as will have been noted, 5 councilmen of the old city are now disposed as follows: to the Virginia Beach borough 1 and to the new city at large 4.

The earlier city was, as is now the borough of Virginia Beach, an oceanside resort looking mainly to summer tourists for its economy. Princess Anne County was formerly half urban and half rural. The new city encompasses about 301.6 square miles, of which 79.6 is water. As found by the District Court, the boroughs are generally of the following character:

Blackwater is agricultural and is expected to continue so for many years.

Pungo is "essentially rural."

Princess Anne, formerly the county seat and now containing the administrative agencies and the State courts, is "still primarily agricultural in nature."

Kempsville is changing rapidly from rural to urban.

Lynnhaven is "a residential area with predominantly urban characteristics."

Bayside "has a considerable quantity of farm land" but as a suburb of the City of Norfolk many of its tracts have been developed for residential occupancy, and the borough has taken on an urban complexion.

Virginia Beach as a borough continues to be a seaside resort as it has always been.

To sustain the 7-4 formula, substantial reliance is put in the requirement in the 1966 Act that the city-wide voters elect all the councilmen. Thus it is stressed, the ballots of

voters in the smaller boroughs are not accorded greater weight than those cast in the larger boroughs: the small-borough voter's ballot is not more effective in electing a councilman than that of the large-borough elector. Correspondingly, the value of the larger-borough vote does not exceed the smaller-borough vote. The one-person-one-vote mandate is thus purportedly obeyed.

But full compliance with the 14th Amendment's Equal Protection Clause, we think, is still wanting. The principle of one-person-one-vote extends also to the level of representation, and exacts approximately equal representation of the people—that each legislator, State or municipal, represent a reasonably like number in population. But that is not achieved in the 7-4 plan; the imbalance in representation in the council is obvious.

For example, Blackwater containing 733 people will have the same assured representation as the borough of Lynnhaven with 23,731 persons, or Bayside with 29,048, or Kempsville with 13,900. Similar contrasts are evident. This disparateness is not cured by the city-wide election provision. "It is the distribution of ... [members] rather than the method of distributing ... [them] that must satisfy the demands of the Equal Protection Clause." *Burns v. Richardson*, 34 U.S.L. Week 4365, 4366 fn. 4 (U.S. April 25, 1966).

Nor is this unequivalence of representation evened by the stipulation for 4 at-large councilmen to represent all of the boroughs. Their election would in no circumstances equalize the representation of the larger boroughs with that of the smaller. True, Lynnhaven and Bayside as the two largest boroughs population-wise could, if they cooperated, elect all of the 4 members. However, if each elected 2, and even if these were considered as in actuality councilmen of that

borough alone, giving it 3 members, the numerical representation per councilman would be far greater than that of Blackwater's member or Pungo's. Indeed, this would be so if all 4 at-large councilmen came from the largest borough, Bayside. Consequently, to repeat, the provision for 4 city-wide members does not remedy or in any way affect the disproportion of representation of the 7 borough members.

That equal representation is embraced in the Constitutional demand, epitomized as the rule of one-person-one-vote, is comprehensively expounded by Judge Sobeloff for this court in *Ellis v. Mayor and City Council of Baltimore*, 352 F2d 123 (4 Cir. 1965). Importantly, the case's subject is fairness in drawing councilmanic election wards and the Constitutional criteria therefor. The opinion demonstrates, passim, that the "true thrust" of *Reynolds v. Sims*, 377 US 533 (1964) and its kin—*WMCA, Inc. v. Lomenzo*, 377 US 633; *Maryland Committee v. Tawes*, 377 US 656; *Davis v. Mann*, 377 US 678; *Roman v. Sincock*, 377 US 695; and *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 US 713—is that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State". (Accent added.) 352 F2d at 128. A city council was there analogized to a State legislature with the admonition that "seats in both houses . . . must be apportioned substantially on a population basis". *Id.* at 129. This distillation would only be watered down by further disquisition or by a rehearsal of the pat quotations the opinion takes from these precedents.

Fortson v. Dorsey, 379 US 433 (1965), cited to sustain the validity of the instant plan, finds acceptable only half of the present design. No fault was found there in the choice

of State senators in a multi-district county by a county-wide electorate, with the requirement that each senator be a resident of one of the districts. True, this scheme finds a parallel in the City of Virginia Beach's charter provision. But there the resemblance ends. In *Fortson* the Court significantly contracted its approval to the method of selection. It explicitly noted the absence of any substantial inequality among the districts. Had there been a vast disparity, such as Blackwater's 733 to Bayside's 29,048, it is not readily conceivable that the Court would have given its endorsement. In *O'Shields et al. v. McNair et al.* (D.S.C. 3-judge court, Feb. 28, 1966) Judge Haynsworth of this court, writing the opinion, termed the substantial population equality of the districts in *Fortson* as "crucial." We agree.

Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give, or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in representation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan. Manifestly, the discussion in *Fortson v. Dorsey*, supra, 379 US 433, 438 seemingly discounting the fear of sectionalism in a district's legislator was conditioned upon "substantial equality of population" among the legislative districts there.

Moreover, confessedly, the Virginia Beach plan was purposed, and drafted with an eye, to include in the makeup of

the council the representation of the peculiar interests of each borough. It was architected to give voice to the agricultural or non-urban concerns of the smaller boroughs. However understandable, reasons of this kind may not be counted in appraising the Constitutionality of an apportionment. *Reynolds v. Sims*, 377 US 533, 562 (1964); *Ellis v. Mayor and City Council of Baltimore, supra*, 352 F2d 123, 128.

Unless enjoined, the 1966 apportionment will control in the next general election of councilmen, now scheduled by general statute for June 14, 1966. It governed in a primary election on April 5, 1966 for the nomination of candidates in the general election. Protestants of the plan ask us to enjoin its further employment, and to order that the June election be held on the basis of a selection of all 11 councilmen from the city at large. However, we think such decrees would be an unneeded disturbance of municipal affairs at this time.

Therefore, the election will be allowed to proceed without delay. The successful candidates will be permitted to organize and serve as the council of the City of Virginia Beach until the next session, whether special or regular, of the General Assembly of Virginia. If no reapportionment is then made of the councilmen, the District Court shall set aside the current apportionment and order an election of the councilmen at large or realign the boroughs so as to equalize substantially their populations.

Counsel fees will not be awarded the protestants, but the City of Virginia Beach will be ordered to pay the costs in the trial court and on appeal. This case will be remanded to the District Court with directions to retain jurisdiction and to proceed in accordance with the views herein expressed.

Reversed and remanded.

JUDGMENT
(Filed May 30, 1966)

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 10,592.

J. E. Clayton Davis, Rolland D. Winter,
Cornelius D. Scully and Howard W. Martin,
Appellants,

vs.

Frank A. Dusch, Member, City Council,
City of Virginia Beach, et al.,
Appellees.

**APPEAL FROM the United States District Court for the
Eastern District of Virginia.**

THIS CAUSE came on to be heard on the record from the
United States District Court for the Eastern District of
Virginia and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and
adjudged by this Court that the judgment of the said District
Court appealed from, in this cause, be, and the same is
hereby, reversed with costs; and that this cause be, and the
same is hereby, remanded to the United States District
Court for the Eastern District of Virginia, at Norfolk, for
further proceedings consistent with the opinion of the Court
filed herein.

Albert V. Bryan
United States Circuit Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 4912

J. E. Clayton Davis, et als,

Plaintiffs,

v.

Frank A. Dusch, et als,

Defendants.

MEMORANDUM

By the terms of House Bill 101, the 1966 Session of the General Assembly of Virginia amended and reenacted certain provisions of the charter of the City of Virginia Beach in an effort to remedy the constitutional defects of the existing charter occasioned by reason of councilmanic mal-apportionment. House Bill 101 was signed by the Governor on February 23, 1966, as an emergency measure and is now in effect.

Prior to the effective date of the new legislation the structure of the City Council of the City of Virginia Beach was in accordance with district or borough representation. As so constituted it was an obvious attempt to afford actual personal representation to areas formerly comprising the County of Princess Anne and the old City of Virginia Beach before the effective date of the merger between the County and City which was on January 1, 1963. The charter incorporating the new City of Virginia Beach was enacted by

the General Assembly at its 1962 Session on the basis of agreements between the governing bodies of the consolidating area approved by popular referenda. This plan of representation was patently unconstitutional under the "one person, one vote" doctrine as enunciated by the recent decisions of the United States Supreme Court, as applied to councilmanic representation in *Ellis v. Mayor and City Council of Baltimore*, 4 Cir., 352 F. (2d) 123. It was the subject of prior memoranda filed on November 9, 1965 and December 7, 1965. Plaintiffs have now, in accordance with the suggestion of the Court, filed a supplemental complaint attacking the validity of the new statute which, for convenient reference, will be called the "Seven-Four Plan."

Princess Anne County, as it existed prior to the effective date of the merger on January 1, 1963, consisted of six districts with the 1960 population stated to be as follows:

District	Population (1960)
Blackwater	733
Pungo	2504
Seaboard	7211
Kempsville	13900
Lynnhaven	23731
Bayside	29048

The various members of the Board of Supervisors of Princess Anne County served as representatives of the individual district and were elected by vote of the qualified voters registered in that district. Upon the effective date of the merger, Seaboard District became Princess Anne Borough, but in other respects the geographical boundaries remained the same. Thus Princess Anne County had six members on its Board of Supervisors prior to the formation of the new city.

The old City of Virginia Beach had five councilmen representing 8091 persons according to the 1960 census. The area comprising the old City of Virginia Beach has been, and is now, largely dependent upon the summer tourist trade for its economic condition, although there are many fine homes throughout the area which are owned by permanent residents.

Former Princess Anne County was approximately 50% urban and 50% rural prior to the merger. The debts of the old county remained with the county under the terms of the merger; the debts of the old City of Virginia Beach remained with the people of that area. This has resulted in an unequal tax rate which continues in the boroughs of the new City of Virginia Beach.

The primary purpose of the merger was to forestall future annexation proceedings contemplated by the City of Norfolk bordering on the Kempsville and Bayside districts into which many citizens of Norfolk were gradually moving and, in addition, land for industrial development was becoming increasingly scarce in the City of Norfolk.

Irrespective of the wisdom of the merger, it has become an accomplished fact. Some pertinent facts of the new City of Virginia Beach are as follows:

1. It consists of 301.6 square miles, of which 222 square miles is made up of land and 79.6 square miles is water.
2. Bayside Borough is approximately 28 square miles in area. While at this time it still has a considerable quantity of farm land, it is essentially a suburb of the City of Norfolk devoted to residential purposes and much of the farm land has been sold for development purposes. It is, therefore, urban in character.

3. Lynnhaven Borough contains approximately 47 square miles. With the exception of some activity in the shellfish industry, Fort Story, Camp Pendleton, and the Oceana Air Base, it is likewise a residential area with predominantly urban characteristics.
4. Kempsville Borough is approximately 36.6 square miles. It adjoins the City of Norfolk and, while it was formerly largely rural, it is now undergoing a rapid expansion in the residential development field. Its state of transition is such that it will soon be largely urban.
5. Virginia Beach Borough contains only 2.4 square miles. Its urban character and great dependence upon the tourist trade has been previously noted.
6. Princess Anne Borough consists of 58.6 square miles. It is the former county seat of government and now houses the major administrative facilities, including the courts, serving the new City of Virginia Beach. Despite the fact that it is also in a gradual transition stage from rural to urban, it is still primarily agricultural in nature.
7. Pungo Borough contains 94.4 square miles of which 63 square miles is water. During World War II the government operated and maintained an airfield but this has since been abandoned. While there are beaches and bays with attractions for the hunters and fishermen, it remains essentially rural and, despite the growth in residential development, it is unlikely that any material change will be forthcoming during the next decade.
8. Blackwater Borough, containing 34 square miles, is agricultural and will probably remain rural for many years to come.

Faced with the problems of this heterogeneous city undergoing governmental transition and a population explosion reflected by the rapid estimated increase between 1960 and 1964¹ the city fathers approached the task of recommending a charter change to come within the constitutional ambit of the "one person, one vote" rule of law.

The new legislation denominated the "Seven-Four Plan" provides for the election of eleven councilmen with the eligible voters of the entire city voting for all candidates. Four persons are elected without regard to their place of residence within the city; the remaining seven, while elected by all voters, must reside in the particular borough and the person must state that he is running from the borough of his residence. For example, Lynnhaven, presently the largest borough in population, would be guaranteed the election of a member of the City Council residing in that borough. Lynnhaven could also have the four members elected at large without regard to residence requirement. The same is true as to Blackwater, the smallest borough. Moreover, the three smallest boroughs, Blackwater, Pungo and Princess Anne, would be assured of the election of one resident from each borough, even though the aggregate of the total population in these counties is considerably less than the population in either Kempsville, Lynnhaven or Bayside.

¹The percentage increase of population in the various boroughs, according to figures presented by plaintiffs' expert, and stated in the Court's memorandum filed December 9, 1965, reveal these approximate figures:

Borough	Percentage Population Increase from 1/1/60 to 1/1/64
Blackwater	17½%
Pungo	12%
Princess Anne	10%
Kempsville	60%
Lynnhaven	59%
Bayside	24%
Virginia Beach	21%

Plaintiffs urge that the "Seven-Four Plan" is in direct violation of the "one person, one vote" doctrine. They insist that there are only two permissible methods of electing councilmen in any city—one by the familiar at-large election without regard to the place of residence within the city—the other by dividing the city into boroughs or wards of approximately even population and providing for the election of representatives within each borough or ward by the voters of that area. While the question is not free from doubt, this Court does not believe that the constitutional limitations of the "one person, one vote" rule extend that far.

In *Fortson v. Dorsey*, 379 U.S. 433, the Supreme Court considered the Georgia Reapportionment Act which permitted the counties to be divided into senatorial districts, with a proviso that a candidate had to be a resident of the district from which he sought election, but all senators within the county were subjected to a county-wide vote rather than a district vote. In reversing the three-judge federal court holding that voters of one district must join with voters of other districts in selecting a group of senators and thereby nullifying their own choice of senator, Mr. Justice Brennan said:

"It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator."

Thus in Blackwater Borough, if Mr. Jones and Mr. Smith declare as candidates for the City Council of the City of Virginia Beach running from the borough of their residence, all qualified voters in Virginia Beach vote in this contest. If Jones is elected, he then represents the entire population of the City of Virginia Beach. He is the city's councilman and not merely Blackwater's councilman. And if he disregards the interests of people residing in other boroughs, his chances of survival at the next election would be indeed slight.²

It is true that under these circumstances, Blackwater, with the least population of any borough, is assured of a resident councilman. Plaintiffs point out that in *Fortson v. Dorsey*, supra, there was "substantial equality of population" among the 54 senatorial districts, whereas wide disparity exists in the boroughs of the City of Virginia Beach. The Court does not believe that this fact, standing alone, invalidates the plan. As the Supreme Court indicated, there may be instances or circumstances which will not comport with the dictates of the Equal Protection Clause where, designedly or otherwise, the plan operates to minimize or cancel out the voting strength of racial or political elements of the voting population. The record in the instant case makes no such suggestion. The principal and adequate reason for providing for the election of one councilman from each borough is to assure

²While not a part of the record in this case, it should be noted that a Democratic Primary was held in the City of Virginia Beach on April 5, 1966, under the newly devised "Seven-Four Plan." Twelve candidates ran for the eleven available seats as Democrats. Opposition existed in only one borough where the defeated candidate, having declared for election from that borough, secured more votes in the particular borough of his residence than the successful candidate. Thus it was the city-wide vote which defeated this candidate. Another interesting sidelight is that the candidate from Pungo Borough received more city-wide votes than any of the twelve men on the ballot; Pungo being the second smallest in population of the seven boroughs comprising the City of Virginia Beach.

that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. It is significant to note, however, that under the "Seven-Four Plan" the control of the City Council can always be vested in the populace of Lynnhaven and Bayside, the two largest boroughs. Assuming that the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside, if united in their efforts, could elect the four councilmen without regard to residence and, together with the two councilmen residing in their respective boroughs, would have the majority control. This would also be true if all eleven councilmen were elected at-large without regard to their place of residence.

Prior to the Supreme Court's decision in *Fortson v. Dorsey*, supra, a three-judge federal court in Georgia had before it the case of *Reed v. Mann*, 237 F. Supp. 22. The judges comprising this court were the same who decided *Dorsey v. Fortson*, 228 F. Supp. 259, which was later reversed *sub nom. Fortson v. Dorsey*. In *Reed* the statutory scheme for DeKalb County called for the county-wide election of five members of its governing body, with four of the members being required to be residents of the district which they offered to represent, the county being divided into four districts and with the proviso that no two members (excluding the chairman) could reside in the same district. The plan was attacked on the theory of deprivation of representative government because the county-wide vote may have overridden the will of those residing in the district. In rejecting this argument the court pointed out that the selection of a system, so long as it is not proscribed by the federal constitution, is not the business of the court. The

court notes that "the political unit here involved is DeKalb County, and it is plain that every voter in the county is treated equally." So also, the City of Virginia Beach is the political unit here involved and every voter in the city is treated equally. As *Reed* states, "it is to the residents of the particular unit that the one-man, one vote rule is to be applied" and "there is no right *per se* to select representatives from any given size district or unit."

The problem presented was recently considered in *O'Shields v. McNair*, F. Supp., decided February 28, 1966, by a three-judge court consisting of Chief Judge Haynsworth and District Judges Martin and Hemphill. By virtue of the South Carolina Senate Reapportionment Act, some small counties were guaranteed a resident senator while other counties of more than twice the population had no such protected right. Of course, unlike the issue here presented, the senatorial candidates were not elected by the voters of the entire state and hence, when elected, became the senator from a particular county or, in multi-county districts, the voters cast their ballots on each senatorial candidate whether the candidate resided in that county or not, and such successful candidate was designated as the representative of the particular district. In discussing the related problem, Chief Judge Haynsworth had this to say:

"We are also aware of the fact that a number of municipalities in this state elect their councils under ward-residence rules. Each electoral contest is framed by opposition between residents of the same ward, but the election is determined by the results of city-wide voting. We may assume that in some of those cities, particularly those which have been operating under that system for a long time, some wards may vary greatly in population.

"We may also assume the general constitutionality of such municipal election schemes, but that does not dispose of the present problem. Here there is no supporting history, and the record furnishes no basis for a finding of a compelling need for resident Senators in some small counties but not in other counties of comparable size and in still others much larger."

In contrast, the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wise cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The "Seven-Four Plan" is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster. *Fortson v. Dorsey*, *supra*.

What must not be overlooked is the fact that each borough will have one or more candidates for the City Council; they are elected by all of the voters of the city to represent the entire city, not merely the borough wherein they reside.

If their election was otherwise, the "Seven-Four Plan" would be constitutionally impermissible. The four members elected at-large without regard to residence would, under normal circumstances, be from the more heavily populated boroughs. The fact that three of the eleven council members must come from the less populated boroughs does not, standing alone, amount to invidious discrimination where they are elected by the voters of the entire city.

The complaint and supplemental complaint will be dismissed. As the plaintiffs substantially prevailed in the initial phase of this litigation, and the defendants have prevailed in the later proceeding, each party will bear its own costs. Counsel for the defendants will prepare and present an appropriate decree after affording an opportunity for inspection and endorsement by counsel for the plaintiffs.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
April 8, 1966

App 20

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action 4912

J. E. Clayton Davis, et al,

Plaintiffs,

v.

Frank A. Dusch, et al,

Defendants.

Civil Action 5006

Frank V. Cogliandro, et al,

Plaintiffs,

v.

H. R. McPherson, et al,

Defendants.

MEMORANDUM

These consolidated actions involve the constitutionality of the apportionment of members of the city councils of the City of Virginia Beach (Civil Action 4912) and the

City of Chesapeake (Civil Action 5006). The charter of each city establishes the membership of the council body by defining the boundaries of the several districts or boroughs, with each district or borough being assigned a specified number of councilmen for election.

Originally these matters were heard before a three-judge court and, by agreement of counsel, it was stipulated that the evidence submitted in the three-judge court hearing could be considered by the judge to whom these cases were first presented in the event the three-judge court arrived at the conclusion that the court should be dissolved.

By order entered and filed on November 9, 1965, the three-judge court was dissolved for reasons stated in an opinion by Circuit Judge Albert V. Bryan.

The opinion of Judge Bryan clearly forecasts the inevitable result in these cases. The factual findings and legal conclusions are incorporated herein by reference. The recent decision in *Ellis v. Mayor and City Council of Baltimore* (4 Cir., October 11, 1965) adopts the "one person, one vote" doctrine to councilmanic representation. And "the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city"—as stated by Judge Bryan—is not denied by any of the defendants. There remains for consideration only the discretion to be exercised in determining how long the temporary systems of representation should continue, bearing in mind that each city was created, essentially to avoid annexation of portions of pre-existing counties, pursuant to charters granted by the General Assembly of Virginia at its 1962 session, the charters being effective January 1, 1963.

Since the three-judge court opinion does not specifically set forth the existing disparities constituting invidious dis-

crimination, it may be well to make these brief additional findings.

Virginia Beach

<i>Representation on Council</i>	<i>District or Borough</i>	<i>Population per District</i>	<i>Estimated Population per District (1/1/64)</i>
1	Blackwater	733	862
1	Pungo	2504	2806
1	Princess Anne	7211	7957
1	Kempsville	15900	22254
1	Lynnhaven	23731	37760
1	Bayside	29048	36027
5	Virginia Beach	8091	10473

The disparity of representation as revealed by the foregoing figures is too clear to require further discussion. We need not refer to the tax differential which establishes that certain districts or boroughs are effectively without representation, even though they maintain the greater portion of the tax burden.

Chesapeake

<i>Representation on Council</i>	<i>District or Borough</i>	<i>Population per District—1960</i>
5	South Norfolk	22,035
1	Butts Road	3,346
1	Deep Creek	11,719
1	Pleasant Grove	7,073
1	Washington	18,952
1	Western Branch	10,522

Once again the disparity of representation is obvious. Further, the charter of the City of Chesapeake provides for a tie-breaker designated by the Corporation Court to cast a vote whenever there is an equally divided vote among the members.

Taking cognizance of the fact that the General Assembly

of Virginia is scheduled to meet in Regular Session during January, 1966, the Court is of the opinion that no order should be immediately entered, other than to stay further proceedings until the commencement of the constructive session on or about March 14, 1966. By that time we will all know what, if anything, has been done by the legislative body of the Commonwealth of Virginia. The City of Virginia Beach has stated that it proposes to submit charter changes touching upon councilmanic representation. The wisdom and constitutionality of these proposed changes are not before the court at this time. If the plaintiffs are dissatisfied with such changes, and arrive at the conclusion that mal-apportionment still exists, they may file a supplemental complaint at the time of the commencement of the constructive session. The City of Chesapeake has not indicated that any charter change will be requested. Such determination is a matter for decision by its legislative representatives and the existing members of the city council. Whatever the final decision may be, this Court is not persuaded that action should be delayed until the 1968 Session of the General Assembly, or until five years following the adoption of the charter. If no constitutional action is taken by the 1966 General Assembly, there will remain the only alternative which will be to order the election of the members of the respective councils on an "at large" basis at such conveniently early date as may be determined by the Court.

The Court reserves for further determination the question of the constitutionality of the tie-breaker as provided by the charter of the City of Chesapeake. This issue may become moot if charter changes are made.

Without passing upon the argument that attorneys' fees should be taxed in favor of the plaintiffs in these actions, it cannot be said that defendants have been guilty of bad

faith in not requesting charter changes at the recent Special Session of the General Assembly convened for the purpose of apportioning the congressional districts following a decision by the Supreme Court of Appeals of Virginia. It was a matter of general knowledge that the Governor expressed a desire to limit the legislative business at that time. Moreover, the *Ellis* case was not decided until after the three-judge court hearing and the law on the subject was not as clear as it now is.

The right is reserved to renew the request for attorneys' fees in the event further proceedings become necessary, but such reservation is without any intimation that these cases are within the limited field of equity matters in which allowances have been made.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
December 7, 1965

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 4912

J. E. Clayton Davis, et al.,

Plaintiffs,

v.

Frank A. Dusch, et al.,

Defendants.

Civil Action No. 5006

Frank V. Cogliandro, et als.,

Plaintiffs,

v.

H. R. McPherson, et als.,

Defendants.

(Argued September 21, 1965. Decided November 9, 1965.)

Before BRYAN, Circuit Judge, and HOFFMAN and BUTZ-
NER, District Judges.

Albert V. Bryan, Circuit Judge:

Whether the principle of "one person, one vote" applies
in the apportionment of members of a municipal council
to the several boroughs of a city is the Constitutional ques-

tion in both of these actions. The immediate issue is whether this question requires a three-judge court to answer it.

The City of Virginia Beach in one case and the City of Chesapeake in the other, both political subdivisions of Virginia, are the municipalities in suit. Plaintiffs in each instance are citizens and qualified voters; defendants are the councilmen and other civic and electoral officials acting under the charters issued to the cities by the State. The governing body in each is a council. The charter establishes its membership. More particularly, it defines the boundaries of the boroughs, and assigns to each a specified number of councilmen for election.

This assignment is now attacked as invalid as a malapportionment violative of the Equal Protection Clause, *Davis v. Mann*, 377 US 678 (1964); and we are asked, because of this alleged Constitutional infirmity in the charter, to enjoin the performance of city functions under it. At the start we are met with the defendants' motion to dissolve the multiple-judge court; which was convened on the prayer of the complaints, and to allow the trial to proceed before the resident judge alone. The point made is that the controversy is of a local nature, without statewide significance, and so not within the intendment of 28 USC 2281. We agree.

The Virginia Beach charter incorporates into a single city the area of the former city of that name plus all of Princess Anne County. Chesapeake is composed of what was the City of South Norfolk with the addition of Norfolk County. Both charters were granted by special acts of the General Assembly in 1962 on the basis of agreements between the governing bodies of the consolidating areas approved by popular referenda. The apportionments of councilmen in the new cities were stated in the agreements. A proviso in each charter requires that a new plan for the

election of councilmen be submitted to the qualified voters of the city not earlier than five years after the adoption of the charter and not later than September 1, 1971.

Obviously, the apportionments made by the charters, besides being only temporary, are not of statewide interest. Their interpretation would not affect any other municipality or county in Virginia. In such unique situations the requirement of 28 USC 2281, that only a three-judge court may enjoin State officers in carrying out the directions of a State law, is not applicable. This is true here whether the defendants be considered as State or city officers. *Rorick v. Board of Comm'rs*, 307 US 208, 212-13 (1939); *Teeval Co. v. City of New York*, 88 F.Supp. 652 (SDNY 1950); see, e.g., *Bianchi v. Griffing*, 238 F.Supp. 997, 998 (EDNY 1965); appeal dismissed for want of jurisdiction, 34 U.S.L. Week 3117 (U.S. Oct. 12, 1965); *McMillan v. Wagner*, 239 F.Supp. 32, 33 (SDNY 1964).

Furthermore, we think that a three-judge court is also inappropriate because this litigation no longer presents a Constitutional question which is beyond the jurisdiction of a sole District Judge. The statute does not require three judges where the decision will be governed by the application of Constitutional principles already authoritatively established. *James & Co. v. Morgenthau*, 307 US 171, 172; *Harvey v. Early*, 160 F2d 836, 838 (4 Cir. 1947). That the "one person, one vote" precept embraces councilmanic representation is now settled in this Circuit. *Ellis v. Mayor and City Council of Baltimore* (4 Cir. October 11, 1965); see also *Bianchi v. Griffing*, supra, 238 F.Supp. 997 (EDNY 1965) and authorities cited therein. Moreover, the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city is not denied by the defendants. What may now and subsequently have to be decided in these cases

are matters well within the province and for the judgment of a one-judge court.

An order will be passed dissolving the three-judge court, and remanding the complaints to the judge of this court at Norfolk (to whom they were first presented) for direction of such remedies as he deems necessary or proper.

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IN THE
Supreme Court of the United States

October Term 1906

No. 724

FRANK A. DUSCH, et al.,

Appellants,

v.

**J. E. CLAYTON DAVIS, ROLLAND D. WINTER,
CORNELIUS D. SCULLY and HOWARD W. MARTIN,**

Appellees.

**On Appeal From The United States Court Of
Appeals For The Fourth Circuit**

MOTION TO DISMISS OR AFFIRM

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IN THE
Supreme Court of the United States

October Term 1966

No. 724

FRANK A. DUSCH, et al.,

Appellants,

v.

**J. E. CLAYTON DAVIS, ROLLAND D. WINTER,
CORNELIUS D. SCULLY and HOWARD W. MARTIN,**

Appellees.

**On Appeal From The United States Court Of
Appeals For The Fourth Circuit**

MOTION TO DISMISS OR AFFIRM

**REASONS FOR DISMISSING APPEAL OR AFFIRMING
THE JUDGMENT OF THE COURT BELOW**

A. The Original District Court Ruling That The One Man-One Vote Doctrine Applied To Political Subdivisions Went Unchallenged Through Legislative Reapportionment, A Second District Court Ruling And The Proceedings In The Court Of Appeals. Only Now Do Appellants Assert The Incorrectness Of The Original Decision And Under Established Principles The Issue Is Improperly Presented Because Of Their Failure To Raise It In The Court Below.

The first and principal point raised by appellants' appeal is the applicability of the doctrine of "One Man — One Vote" to local government. An appeal involving this issue is not timely taken or properly raised.¹

Appellees, residents and voters of the four most populous boroughs of the City of Virginia Beach and hereinafter referred to as "VOTERS", filed their complaint to reapportion their City Council in compliance with the principle of "One Man — One Vote".²

This case was heard concurrently with a similar complaint brought by citizens of the adjacent City of Chesapeake, Virginia.

In a Memorandum Opinion dated December 7, 1965, District Judge Walter E. Hoffman held that the principle of "One Man — One Vote" was applicable to local government and declared the Councils of the City of Virginia Beach and the City of Chesapeake to be malapportioned. (Appellants' App. 21).

The District Court gave each city involved the option of going to the General Assembly and seeking charter changes that would correct the malapportionment then existing, or submit to a Court Order requiring elections on an at large basis.

¹ 28 U.S.C. §2101 (c):

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

² *Doyle v. Mann*, 377 U.S. 678, 84 S.Ct. 1441 (1964); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713, 84 S. Ct. 1450 (1964); *WMCA v. Lomenzo*, 377 U.S. 633, 84 S. Ct. 1416 (1964).

An Order was entered on this opinion on December 7, 1965.³ No appeal was noted from this Order and appellants accepted the terms of this Order that the principle of "One Man — One Vote" was applicable to the City of Virginia Beach and went to the General Assembly pursuant to the terms of the order and obtained a Charter change known as the "Seven-Four Plan".⁴

The neighboring city involved in the consolidated hearing amended its Charter to provide for at large elections for members of its Council.

"VOTERS", as provided in the District Court's decree of December 7, 1965, filed a supplementary complaint contesting the constitutionality of the "Seven-Four Plan", which plan was designed to preserve rural representation by providing residential councilmen from boroughs containing populations that continued to be flagrantly disproportionate.⁵

³ For reasons stated in a memorandum this day filed, the further proceedings in these cases are stayed and the matters are continued until March 14, 1968, at which time further proceedings may be had on motion of any party in interest. The Clerk will forward copies of the memorandum and certified copies of this order to counsel of record.

(Signed) Walter E. Hoffman
United States District Judge

⁴ As a matter of legislative comity, the Charter changes bearing the unanimous endorsement of City officials are routinely granted by the Virginia General Assembly.

Residential Representation On Council	District Or Borough	Population Per District	Estimated Population Per District (1/1/64)
1	Blackwater	733	862
1	Pungo	2,504	2,808
1	Princess Anne	7,211	7,957
1	Kempsville	13,900	22,254
1	Lynnhaven	23,731	37,760
1	Bayville	29,048	36,027
1	Virginia Beach	8,091	10,473
4	Councilmen Elected At Large		

Appellants did not plead or brief the issue now being raised regarding the applicability of "One Man — One Vote" in the District Court hearing on "VOTERS" supplementary complaint or on appeal before the Court of Appeals for the Fourth Circuit.⁶

The issue of the applicability of "One Man — One Vote" to this case was settled by the District Court Order of December 7, 1965, which was not appealed and the issue not having been presented to the Court of Appeals for the Fourth Circuit it cannot now be raised.⁷

B. Condemnation Of The "Seven-Four Plan" By The Court Of Appeals For The Fourth Circuit Is Consistent With The Principle Of "One Man-One Vote" And Constitutes Only One Of Many Lower Court Implementations Of This Established Principle And Does Not Constitute A Substantial Question That Should Be Reviewed By This Court

The simplicity of the principle laid down in what has been termed the "One Man — One Vote" test in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964) and its com-

⁶The questions presented to the Court of Appeals for the Fourth Circuit were stated in "VOTERS" brief in that Court as follows:

"A. Is the Seven-Four Plan constitutional?

B. Are "VOTERS" entitled to a stay of the pending election under the 'Seven-Four Plan'?

C. Are "VOTERS" entitled to attorneys' fees?"

Appellants herein adopted those questions, stating in their brief before the Fourth Circuit:

"The three questions stated in Voters' brief correctly present the ultimate issues of the case."

⁷ *Corrigan v. Buckley*, 271 U.S. 323, 330, 331, 46 S.Ct. 521, 523, 524, 70 L. Ed. 909, (1926)

*** It is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. ***

(Emphasis Added)

See also *Shelley v. Kraemer*, 334 U.S. 1, 8, 68 S. Ct. 836, 840.

panion cases, has restored representative government to the legislative bodies of this nation at an orderly and expeditious pace.⁸

Appellants admit that the only purpose of the "Seven-Four Plan" is to insure the election of persons familiar with the rural point of view. (Appellants' Jurisdictional Statement, P. 13).⁹

This Court has established the general principle that governs this case — that the balancing of rural and urban influence cannot be effected at the expense of equal representation.¹⁰

⁸ The shift of population-based apportionment in the state legislatures of the United States has almost been completed, a Congressional Quarterly survey shows. While minor adjustments will still be required in a number of states, the latest count shows that 46 of the 50 legislatures will enter the 1966-67 elections with districts based substantially on the population principle.***

*** During the period from January 1, 1965 to June 1, 1966, 39 states took action — either legislative, judicial or otherwise — to reapportion one or both of their legislative bodies on a 'one-man, one-vote' basis for the next state legislative elections.

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⁹ The "Seven-Four Plan" provides, in effect, that 733 people in Blackwater District shall be guaranteed One (1) Councilman familiar with agriculture to represent their rural views, while the school, sanitation and road problems of the 29,048 persons living in Bayside shall only be guaranteed One (1) such specialized residential Councilman.

¹⁰ *Davis v. Mann*, 377 U.S. 678, 692, 84 S. Ct. 1441, 1448 (1964):

"We also reject appellants' claim that the Virginia apportionment is sustainable as involving an attempt to balance urban and rural power in the legislature.***"

In *Reynolds v. Sims*, 377 U.S. 533, 580, 84 S.Ct. 1362, 1391 (1964) the principle that controls this case was established:

**** Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again,

This Court can only accept review of cases of general applicability or for the purpose of producing uniformity in the interpretation of federal laws or constitutional guarantees.

Appellants admit that their plan, designed to protect rural interests at the expense of equal representation, is a "true hybrid" and is unique. Review of such a hybrid plan could only serve to create doubt and confusion regarding the thrust of "One Man — One Vote".¹¹

people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing."

- ¹¹ If the "Seven-Four Plan" is reviewable, it will stimulate the conception of other evasive plans. If valid, the Virginia Constitution could be amended to enlarge the House Of Delegates to 140 members, with one Delegate being assigned to every city and county in Virginia, regardless of size, and the gross malapportionment would be justified by allowing the voters of each political subdivision to vote for the resident Delegate of the other subdivisions. Such a scheme would return us to the urban-rural imbalance of malapportioned representation that has so recently been corrected.

CONCLUSION

For the above reasons, this appeal should be dismissed or affirmed.

Respectfully submitted,

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Dated November 21, 1966

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IN THE
Supreme Court of the United States

October Term, 1966

NO. 724

FRANK A. DUSCH, ET AL.,

Appellants,

v.

**J. E. CLAYTON DAVIS, ROLLAND D. WINTER,
CORNELIUS D. SCULLY AND
HOWARD W. MARTIN,**

Appellees.

**On Appeal from the United States Court of Appeals
for the Fourth Circuit**

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (R. 116-122) is reported at 361 F. 2d 495. The opinion of the United States District Court for the Eastern District of Virginia (R. 105-115), which was reversed by the Court of Appeals, is not reported.

The opinions of the three-judge district court (R. 74-77)

and the one-judge district court (R. 78-82) deciding earlier phases of this case are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1966 (R. 123). Notice of Appeal was filed August 26, 1966 (R. 124-25). By order of Circuit Court Judge Albert V. Bryan, the time for docketing this appeal was extended seven days (R. 126), i.e., to November 1, 1966, and the appeal was docketed on October 26, 1966. By order entered on January 9, 1967, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 127).

The jurisdiction of this Court rests on 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

(1) Whether a three-judge court should have been convened to consider the constitutionality of the "Seven-Four Plan" prescribed by the Charter of the City of Virginia Beach, Virginia (Ch. 147, Acts of Assembly of 1962, as amended by Ch. 39, Acts of Assembly of 1966) for the election of councilmen of that city.

(2) Whether the doctrine of "one man, one vote," as enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964) and related decisions for apportionment of members of state legislatures also applies to the apportionment of members of a city council among the several boroughs or wards of a city.

(3) If such doctrine does apply, whether the Seven-Four Plan results in such invidious discrimination as to violate the Equal Protection Clause of the Fourteenth Amendment.

STATUTES INVOLVED

The requirements for a three-judge court are set forth in 62 Stat. 968, 28 U.S.C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The Seven-Four Plan for election of councilmen of the City of Virginia Beach, Virginia, is contained in Sections 3.01 and 3.02 of its Charter as amended by Ch. 39, Acts of Assembly of 1966:

"§ 3.01 COMPOSITION. The City shall be divided into seven boroughs. One of such boroughs shall comprise the city of Virginia Beach as existing immediately preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the remaining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the city at large.

"§ 3.02 ELECTION OF COUNCILMEN. On the second Tuesday in June in 1966 and on the second Tuesday in

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June of every fourth year thereafter, there shall be a general election at which the qualified voters of the city shall elect eleven councilmen for terms of four years beginning on the first day of September next following the date of their election and until their successors are duly elected and qualified. Each candidate shall state whether he is running at large or from the borough of his residence, but otherwise, candidates shall be nominated under general law. Election and qualification of councilmen in nineteen hundred sixty-six shall terminate the terms of all incumbent councilmen even though they may have been elected for longer terms."

STATEMENT OF THE CASE

The facts in this case are not in dispute.

The present City of Virginia Beach came into being in 1963 when the former city of the same name, a resort city having an area of 2.4 square miles and a 1960 population of 8,091, consolidated with adjoining Princess Anne County, a county with both rural and urban development and having an area of almost 300 square miles and a 1960 population of 77,121. While the immediate motivating factor for consolidation was the threat of annexation of portions of the former county by the City of Norfolk, the need of the former city to expand its boundaries and the resulting simplification and economy of government were other reasons for consolidation (R. 36). See also *Davis v. Dusch*, 205 Va. 676, 139 S.E. 2d 25 (1964).

The consolidation plan called for a borough form of government to include seven boroughs with one borough corresponding to the boundaries of the former city and six boroughs corresponding to the boundaries of the six magisterial districts of the former county. The boroughs are Virginia Beach, Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly called Seaboard) and Pungo. Un-

5

der this plan a higher tax rate could be levied in those areas which desired more services of government than were desired in the city as a whole. For example, the urban borough of Bayside could have and pay for garbage collection without taxing the rural borough of Pungo which had no such need. Providing direct representation of each borough to represent its needs was considered the cornerstone of the plan (R. 37-38).

The former city was governed by a council of five elected at large and the former county by a six man board of supervisors, one elected by and from each magisterial district. The consolidation plan combined these existing systems into an initial council of eleven. This was an interim plan designed to attract the required majority vote in both the former city and county necessary to achieve consolidation and to guarantee that the needs of a new city, half rural and half urban, would be provided for during a period of transition. It was recognized that this system would not satisfy the longer range needs of the city and the plan provided that another system of election be initiated not sooner than 1968 and not later than 1971 (R. 52).

Consolidation was effected pursuant to Article 4, Chapter 9, Title 15, Code of Virginia of 1950 (now Article 4, Chapter 26, Title 15.1). The charter embodied in the plan was approved by the General Assembly of Virginia (Ch. 147, Acts of Assembly of 1962) and consolidation became effective on January 1, 1963. For the charter and the consolidation agreement of which it was a part, see R. 48-73 and R. 40-48.

Two things characterize Virginia Beach today—its explosive growth and its heterogenous physical and economic composition.

Total population increased from 85,218 at the 1960 census to an estimated 118,139 in 1964, an overall increase of

40% in four years, and the trend continues.* The seven boroughs, their sizes and populations are as follows:

Borough	Area—Sq. Mi.	Population	
		1960	1964 (est.)
Bayside	28	29,048	36,027
Blackwater	34	733	862
Kempsville	36.6	13,900	22,254
Lynnhaven	47	23,731	37,760
Princess Anne	58.6	7,211	7,957
Pungo	94.4	2,504	2,806
Virginia Beach	2.4	8,091	10,473

The three northern boroughs of Bayside, Kempsville and Lynnhaven are primarily urban. Their large residential areas house persons employed in the adjoining City of Norfolk and at the numerous nearby military installations. These boroughs also contain most of the city's commercial and industrial areas as well as its potential for future development of this character. The three southern boroughs of Blackwater, Princess Anne and Pungo are primarily rural and appear destined to remain that way. Agriculture is the dominant industry but substantial areas are also devoted to recreational uses. The borough of Virginia Beach is centered almost entirely around its famous ocean beach and the tourist industry (R. 99-102).

On December 29, 1964, J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, plaintiffs below and appellees here (herein referred to as

* According to figures recently released, Virginia Beach now has an estimated population of 131,860. *Estimate of the Population of the Counties and Cities of Virginia as of July 1, 1966*, Bureau of Population and Economic Research, University of Virginia, Charlottesville, Virginia, October 19, 1966.

"Voters"), filed a complaint (R. 1-11) in the United States District Court against Frank A. Dusch and others, being the members of the council and the electoral board, the commissioner of revenue and the treasurer of Virginia Beach (herein referred to as "Officials"). The complaint sought the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 to declare unconstitutional the charter plan for election of councilmen and to enjoin the holding of elections under that plan, assessing and collecting taxes, selling bonds and appropriating revenues therefrom until a new council be constituted. The two members of the House of Delegates from Virginia Beach were added as defendants by a supplemental complaint (R. 20-21). In their answers to the original and the supplemental complaints (R. 13-16, 21-22). Officials contended that the District Court lacked jurisdiction of the matter, that this was not a proper case for a three-judge court and that all of the requested relief should be denied. The case was heard upon the testimony taken in a former proceeding in the Supreme Court of Appeals of Virginia, *Davis v. Dusch*, 205 Va. 676, 139 S.E. 2d 25 (1964), Record No. 5928. The three-judge court on November 9, 1965, ordered its own dissolution on the ground that "the controversy is of a local nature, without statewide significance, and so not within the intendment of 28 U.S.C. 2281" and on the further ground that in view of the recent decision in *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123 (4th Cir. 1965), no constitutional issue beyond the jurisdiction of a single district judge was presented (R. 74-77). On December 7, 1965, the district judge to whom the case was referred held that the charter plan was unconstitutional as violating the doctrine of one man, one vote (R. 78-82). Further proceedings were stayed to allow the city an opportunity to seek a charter amendment at

the 1966 session of the state legislature. The city council had previously committed itself to do so anyway (R. 17-19).

The General Assembly of Virginia amended the Virginia Beach city charter on February 23, 1966, to provide for the election of councilmen under the Seven-Four Plan (Ch. 39, Acts of Assembly of 1966). The council numbers eleven as before, all to be elected by the qualified voters throughout the entire city. One must reside in each of the seven boroughs and the remaining four are elected without reference to residence. Each candidate must declare at the time of filing whether he is running for a borough seat or an at-large seat.

The Seven-Four Plan was selected over several other proposals as the best form of government for a unique and heterogenous city during a period of continued growth and transition. Agriculture is still the city's largest industry and three of the seven boroughs are predominantly rural. It was considered essential to insure that persons having a knowledge of the rural problems which had such an impact on a substantial portion of the city's area and economy would sit on the council. While it was felt that traditional at-large elections would come in time, the Seven-Four Plan was considered best for the city's present needs while still giving all qualified voters the same opportunity to vote for all councilmen (R. 93-97).

Pursuant to leave granted them by the December 7, 1965, order of the District Court, Voters filed a supplemental complaint on March 8, 1966, challenging the validity of the Seven-Four Plan and seeking an injunction against all elections to be held thereunder (R. 83-87). On April 8, 1966, the District Court held that the Seven-Four Plan did not violate the doctrine of one man, one vote and dismissed the original, amended and supplemental complaints (R. 105-115).

On appeal to the Court of Appeals for the Fourth Circuit, that court reversed on May 30, 1966. While refusing to enjoin the councilmanic election scheduled under general law to be held on June 14, 1966, the Court of Appeals remanded the case to the District Court with instructions to set aside the current apportionment and order an election at large or realign the boroughs so as to equalize substantially their populations if no reapportionment is made at the next session of the General Assembly. It is from this opinion (R. 116-122) and accompanying judgment (R. 123) that this appeal has been taken.

SUMMARY OF ARGUMENT

Contrary to the implication in this Court's order postponing the determination of jurisdiction of this appeal, there can be no doubt about the procedure below. A single district judge properly heard and determined the issues as only a city charter enacted as a state statute of limited application was involved. There is presented here no state statute of state-wide application which is a prerequisite for a three-judge court.

This Court has not previously, and should not now, sanction federal judicial intervention into the manner of election of local governing bodies. Yet, we do not rest our case on this ground alone. The Seven-Four Plan is entirely consistent with the now familiar one man, one vote principles of *Reynolds v. Sims*, 377 U. S. 533 (1964), for state legislative apportionment. Every voter has an equal opportunity to participate in the election of all eleven councilmen. Further, the needs of local government require greater flexibility in deviation from strict population-based standards than for state government.

The Seven-Four Plan should be judged not as a pattern of representation but as a tailor-made plan to meet the pe-

culiar needs of Virginia Beach. No other city in this country presents a similar combination of dynamic growth and diverse physical and economic elements in a vast area of 300 square miles. No other constitutional plan can provide for the needs of this city as effectively.

ARGUMENT

I

This Case Was Properly Heard By A Single District Judge Because The Statutory Grounds For A Three-Judge Court Were Not Met

Pursuant to Voters' original complaint a three-judge district court was convened. That court agreed with Officials that the requisite statutory grounds were not met because the controversy was of a purely local nature and directed the case to be heard by the resident district judge alone (R. 77-78). The controversy presented on the supplemental complaint was also of a local nature and accordingly was heard by the same district judge. In its Order Postponing Jurisdiction entered on January 9, 1967, the Court directed counsel to brief and argue "the question of whether a three-judge court should have been convened" (R. 127).

A three-judge court is required by 28 U.S.C. §2281 when an injunction is sought to restrain on federal constitutional grounds a state officer in the enforcement of a state statute. The purpose of the statute, as carefully articulated in *Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 260 U.S. 212 (1922), was to prevent unnecessary conflict between federal and state authority by depriving a single federal judge of the power to enjoin the regular enforcement of a state statute by requiring full deliberation of so important a matter by three federal judges. The decisions have always treated this as a technical statute to be narrowly construed. For example, in *Phillips v. United States*, 312 U.S. 246, 250-51 (1941), this Court said:

"The history of § 266 [now 28 U.S.C. § 2281], the narrowness of its original scope, the piece-meal explicit amendments which were made to it, the close construction given the section in obedience to Congressional policy, combined to reveal § 266 not as a measure of board social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." (omitting citations of authorities)

The Court has recently reaffirmed this policy of strict construction. See, e.g., *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); *Kennedy v. Mendoza-Martinez*, 372 U. S. 144 (1963); *Bailey v. Patterson*, 369 U.S. 31 (1962).

In order to convene a three-judge court in such cases as this, 28 U.S.C. § 2281 requires that two conditions be met. The constitutionality of a state statute of general state-wide application must be challenged and the suit must seek to restrain the action of state officers. Neither condition exists here.

A. THE VIRGINIA BEACH CHARTER IS NOT A STATE STATUTE WITHIN THE MEANING OF 28 U.S.C. § 2281

The Seven-Four Plan is a state statute because it is a part of the charter of the City of Virginia Beach granted by the General Assembly of Virginia. But that is not enough. In order to be a state statute within the contemplation of 28 U.S.C. § 2281, the statute must be one of state-wide application rather than one of merely local effect.

This conclusion is compelled by *Rorick v. Board of Comm'rs*, 307 U.S. 208 (1939). Bondholders of the Everglades Drainage District in Florida sought to enjoin the enforcement of statutes effecting changes in rates and collection of taxes. Since the statutes involved only a single district and did not represent general state-wide policy, this Court held

a three-judge court should not have been convened (307 U.S. at 212):

"*Ex parte Collins*, [277 U.S. 565] reinforced by *Ex parte Public National Bank*, 278 U.S. 101, authoritatively established the restricted class of cases to which the special procedure of § 266 [now 28 U.S.C. § 2281] must be confined. 'Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving 'a statute of general application' and not one affecting a 'particular municipality or district' can invoke § 266. Plainly, the matter here in controversy is not one of statewide concern but affects exclusively a particular district in Florida"

In *Oliver v. Mayor and Councilmen*, 346 F. 2d 133 (5th Cir. 1965), the Court of Appeals for the Fifth Circuit held that the statutory charter of the City of Savannah Beach, Georgia, was not a state statute for the purpose of 28 U.S.C. § 2281. Relying squarely on the language from *Rorick* quoted above, that court held that the single district judge properly refused to request the convening of a three-judge court to hear a challenge on constitutional grounds of a charter provision granting nonresident property owners the right to vote in municipal elections. City charters were also held not to be state statutes within the meaning of 28 U.S.C. § 2281 in *Uihlein v. City of St. Paul*, 32 F. 2d 748 (8th Cir. 1929), *cert. denied*, 281 U.S. 726 (1930) and in *McMillan v. Wagner*, 239 F. Supp. 32 (S.D.N.Y. 1964). To the best of our knowledge, no decision has ever held a city charter to be a 28 U.S.C. § 2281 state statute.

In *Griffin v. County School Board*, 377 U.S. 218 (1964), this Court reviewed the granting of an injunction by a single judge forbidding Prince Edward County, Virginia, from paying tuition grants or giving tax credits under a state statute so long as the public schools remained closed to

avoid this Court's school desegregation decisions. The Court stated: "Even though actions of the State are involved, the case, as it comes to us, concerns not a statewide system but rather a situation unique to Prince Edward County." (377 U.S. at 228). The Court held that under the controlling decision in *Rorick* a three-judge court was not necessary and that the single district judge was correct in adjudicating the controversy.

The rule enunciated in *Rorick* that statutes applicable only to a particular locality are not state statutes for the purpose of convening a three-judge court under 28 U.S.C. § 2281 has been recognized in still other cases. See, e.g., *Pierre v. Jordan*, 333 F. 2d 951 (9th Cir. 1964), cert. denied, 379 U.S. 974 (1965); *Teeval Co. v. City of New York*, 88 F. Supp. 652 (S.D.N.Y. 1950). Not a single decision of which we are aware detracts from the applicability of that rule here. The Seven-Four Plan was enacted by Ch. 39, Acts of Assembly of 1966, as an amendment to the Virginia Beach charter. It applies to no other locality. Further, not one of the charters of the 35 other cities or the more than 200 towns in Virginia has a provision for councilmanic elections that resembles the Seven-Four Plan in any respect. There is no way for this Court to hold that a three-judge court should have been convened here without overruling *Rorick*.

B. THOSE AGAINST WHOM THE INJUNCTION IS SOUGHT ARE NOT STATE OFFICERS

Even where the challenged statute is a state statute of state-wide effect and application, a three-judge court is not proper unless the suit seeks to restrain the action of a state officer in the enforcement of the statute. This Court so held in *Ex parte Public Nat. Bank*, 278 U.S. 101 (1928). There the bank sought to enjoin the receiver and the collector of

taxes of New York City from collecting taxes pursuant to a state statute. The three-judge court held that it had no jurisdiction to hear the controversy because neither defendant was a state officer and the suit involved only the action of city officials in the collection of taxes for the use of the city.

The point is forcefully illustrated by the following language in *City of Cleveland v. United States*, 323 U.S. 329, 332 (1945):

"The section is inapplicable to suits challenging local ordinances or statutes having only local application. But these cases involve state law the application of which is state-wide. If the taxing officials were, in these instances, though acting under such a law, doing so as local officials and on behalf of the locality and not as officers of the State, the section is inapplicable to suits to restrain them...."

The only injunctive relief sought by the supplemental complaint was that the defendant members of the Electoral Board of the City of Virginia Beach and other election officials be enjoined from printing ballots or holding elections pursuant to the Seven-Four Plan (R. 86). That these defendants are local rather than state officials is too obvious for argument. Thus, a three-judge court would not have been proper even if the charter were a state statute within the meaning of 28 U.S.C. § 2281.

II.

Apportionment Of Local Governing Bodies Is Beyond The Scope Of The Equal Protection Clause

Neither *Baker v. Carr*, 369 U.S. 186 (1962), nor any subsequent decision of this Court has decided or suggested that intervention of the federal judiciary is proper in ap-

portionment of governing bodies below the level of state legislatures. Several state and federal courts have done so by applying to city councils, county boards of supervisors and school boards the one man, one vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964). But other courts have respected our dual system of government by holding that the United States Constitution does not require the apportionment of local governing bodies in accordance with population. Decisions of this Court suggest, if not compel, the conclusion that this is the proper approach.

The tens of thousands of political subdivisions of the several states have no inherent sovereignty. As creatures of the state they are subject to complete control by its legislature. So long as the people are afforded equality of representation in the legislature, the requirements of the Equal Protection Clause have been fulfilled. This conclusion draws strong support from Mr. Chief Justice Warren speaking in *Reynolds* (377 U.S. at 575):

"Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' . . ."

A state legislature, in the exercise of its authority over units of local government, could provide, without violating

the Constitution, that local officials be appointed rather than elected. Such is the clear implication of *Fortson v. Morris*, 385 U.S. 231 (1966), where this Court held that there is no provision in the Constitution which either expressly or impliedly dictates the method a state must use in selecting its governor. Mr. Justice Black, in discussing *Gray v. Sanders*, 372 U.S. 368 (1963), said (385 U.S. at 233):

"Not a word in the Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly."

It is illogical to say that the legislature can appoint members of a local government, but if the members are to be elected, cannot determine the standards of election or the manner in which the members shall be elected.

The Equal Protection Clause does not require federal judicial intervention in this case.

III.

The Seven-Four Plan Is Consistent With The One Man, One Vote Mandate Of The Equal Protection Clause

Should this Court determine that apportionment of local governing bodies comes within the scope of the Equal Protection Clause of the Fourteenth Amendment, the Seven-Four Plan is sustainable on either of two grounds. First, the plan is consistent with the one man, one vote principles of *Reynolds v. Sims*, 377 U.S. 533 (1964) for state legislatures. But it is not necessary that the plan conform to those standards because the needs of local government require that this Court permit greater flexibility in the apportionment of local governing bodies than state legislatures.

A. THE SEVEN-FOUR PLAN ACCORDS WITH THE ONE MAN, ONE VOTE STANDARD FORMULATED IN REYNOLDS V. SIMS.

The message of *Reynolds v. Sims*; *supra*, and the related state legislative apportionment decisions is that the Equal Protection Clause of the Fourteenth Amendment guarantees to each voter an equally effective voice in the election of the state legislature. To achieve this end, population must be the controlling factor.

The Seven-Four Plan accords with this standard. All councilmen are elected by all of the city voters and represent all of its people. Inherent in the opinion of the Court of Appeals is the erroneous conclusion that the seven resident councilmen represent the boroughs in which they reside. That court refused to acknowledge that these councilmen represent the entire city. Yet, so long as election depends on the vote of the city as a whole, a residence requirement cannot change the city's councilman to the borough's councilman. The point is illustrated in *Fortson v. Dorsey*, 379 U.S. 433, 438 (1965), where, in upholding a residence requirement for the election of state senators from a multi-district county, Mr. Justice Brennan stated:

"It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-districts counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator . . ."

In *Fortson* a three-judge district court held unconstitutional a Georgia statute requiring county-wide voting in counties having plural senatorial districts. In reversing, this Court held the plan valid because the weight of each vote was substantially equal (379 U.S. at 438):

"If the weight of the vote of any voter in a Fulton County district, when he votes for seven senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident of a single-member constituency, we cannot say that his vote is not 'approximately equal in weight to that of any other citizen in the State.'"

Unlike Virginia Beach, there was substantial equality of population in the Georgia senatorial districts. This fact, standing alone, does not invalidate the Seven-Four Plan.

Prior to this Court's decision in *Fortson*, the same three-judge court which decided *Fortson* upheld the validity of county-wide election of the five county commissioners in DeKalb County, Georgia, under a statute providing that four of the five must reside in the districts from which they offer for election. *Reed v. Mann*, 237 F. Supp. 22 (N.D. Ga. 1964). It was contended that representative government would not tolerate the possibility that the will of the district be defeated by the county-wide vote but the court disagreed (237 F. Supp. at 24):

"The teachings of *Gray v. Sanders*, supra, is to first determine the geographical unit, and then to see if the voters in the unit are treated equally. This is the one-man one-vote admeasurement. The political unit here involved is DeKalb County, and it is plain that every voter in the county is treated equally."

Here the political unit is Virginia Beach. Since every voter has one vote for each of eleven councilmen, every voter within the city is treated equally.

Multi-member districts were also considered in *O'Shields v. McNair*, 254 F. Supp. 708 (D.S.C. 1966). The South Carolina Reapportionment Act guaranteed resident senators to some counties in multi-member districts by providing that one of two senators must reside in each of the district's counties which differed sharply in population. No such protected right was accorded other counties of more than twice the size. In discussing the related problem of ward residential requirements in at-large councilmanic elections that court said (254 F. Supp. at 714):

"We are also aware of the fact that a number of municipalities in this state elect their councils under ward-residence rules. Each electoral contest is framed by opposition between residents of the same ward, but the election is determined by the results of city-wide voting. We may assume that in some of those cities, particularly those which have been operating under that system for a long time, some wards may vary greatly in population.

"We may also assume the general constitutionality of such municipal electoral schemes, but that does not dispose of the present problem. . . ."

Ward residence requirements for at-large election of city councilmen are not uncommon. There are at least 56 cities with a population in excess of 5,000 in 22 different states having such requirements. Municipal Year Book, p. 93 (International City Managers Association, 1966). While we do not know the relative population of the wards in those cities, we may assume, as did the court in *O'Shields*, that they vary greatly in population.

B. LESS RIGID APPORTIONMENT STANDARDS SHOULD BE APPLIED TO LOCAL GOVERNING BODIES THAN TO STATE LEGISLATURES

The Court of Appeals erred when it held that *Reynolds* prohibits the consideration of *any* factors other than population. This conclusion misses in part the teaching of that decision (377 U.S. at 560-61):

"Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures."

The Court expressly recognized that there may be *some* deviation from population factors (377 U.S. at 580):

"Citizens, not history or economic interests, cast votes. Considerations of area *alone* provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid 1960's, *most* claims that deviations from population-based representation can validly be based *solely* on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, *for the most part*, unconvincing." (Emphasis added)

Several lower court decisions have also recognized that departures from the population standard will be permitted where there is specific proof justifying the deviation. See *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123, 126 (4th Cir. 1965) and *O'Shields v. McNair*, 254 F. Supp. 708, 712-13 (D.S.C. 1966).

Less rigid standards for local apportionment are forecast by *Reynolds*. In implementing at the state level the principles set forth for congressional representation in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court declared that "distinctions may well be made between congressional and state legislative representation" and, accordingly, "somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment" (377 U.S. at 578).

While the Court in *Reynolds* rejected the consideration of factors other than population, such as the history or individual characteristics of a state, the reasons for doing so in the state cases are not convincing here. State governments number 50. Their powers and problems are similar—taxation, education, public roads, mental hospitals, conservation of natural resources, etc. Local government, on the other hand, presents the broadest imaginable spectrum. Their governing bodies number in the tens of thousands and differ widely in powers and responsibilities. They include counties, cities, townships, metro governments, school districts, hospital districts and planning commissions. They include units of both limited and broad legislative powers. And units of the same name may have different functions from state to state. For example, in Virginia a county exercises substantially all governmental powers except for maintenance of roads, while in Alabama a county has few powers other than maintenance of roads.

We do not advocate that the Court discard population as the controlling factor. We simply say that the Equal Protection Clause as applied to local governing bodies should be interpreted to require a rational system responsive to local conditions while preserving a representative form of government subject at all times to the will of the majority. What may be constitutional for Virginia Beach may be entirely unacceptable for Richmond. But the straight jacket imposed by the opinion below by an automatic application of mathematical precision must be removed.

C. THE SEVEN-FOUR PLAN PROVIDES THE MOST EFFECTIVE AND MOST REPRESENTATIVE FORM OF GOVERNMENT FOR THE NEEDS OF ALL THE CITIZENS OF THE CITY

The Virginia Beach city council in proposing the Seven-Four Plan considered three approaches to representation—traditional at-large elections without regard to residence, election by and from wards or boroughs of substantially equal population and at-large elections with a residential requirement. Either of the first two methods, although passing all constitutional tests, would produce bizarre results at Virginia Beach.

As pointed out in a recent annotation, traditional at-large elections promote the denial of minority interests. Annotation, "Inequalities in Population of Election Districts on Voting Units as Rendering Apportionment Unconstitutional," 12 L ed 2d 1282 (1965). This is true whether the minority interests are those of race or political party or, as in this case, those of the sparsely settled rural areas. At Virginia Beach the boroughs of Lynnhaven and Bayside or Lynnhaven and Kempsville could elect all eleven councilmen. This might not be significant in the average city where all of its problems are apt to be essentially urban in nature. But with

its 300 square miles consisting of relatively small urban centers, extensive suburban development and vast agricultural and undeveloped areas, Virginia Beach is unique. This rapidly growing and changing new city cannot afford to take the chance that none of its councilmen will be familiar with its major industry and the related problems of the rural sections which comprise more than half its area.

As pointed out in the above annotation, ward elections solve these problems but create others (12 L ed 2d at 1282):

"Districting—the election of representatives from various districts—overcomes these disadvantages of at-large elections, and from the very beginning of our nation has been used at all levels of government, national, state, and local. While overcoming these disadvantages, however, districting raises the complicated question of how the total territory should be apportioned, or districted."

It is for this very reason that the council considered—and rejected—strict ward or borough elections for Virginia Beach (R. 103). For example, one substantial subdivision may drastically alter the distribution of population among voting districts within a short time. When we realize that two boroughs experienced population increases of 60% in just four years, it is easy to understand why such a system would not be suitable here. Ward elections just cannot keep up with demographic changes at Virginia Beach.

The Seven-Four Plan overcomes these objections to the traditional at-large and ward elections by combining the best elements of both systems. That plan insures a free and effective vote for all while permitting an intelligent expression on the council of views relating to every phase of the city's varied life. The city fathers deemed it essential to insure that some members of the council be familiar with agricul-

tural and rural problems (R. 92-94). The fundamental fairness of the Seven-Four Plan is illustrated by excerpts from the District Court opinion:

"The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. . . . (R. 111)

* * *

"... the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wise cities in the United States. . . ." (R. 113-14)

This is not the typical case in which areas having unequal population have the same amount of representation, thus giving one vote in the smaller area greater value than one vote in the larger area. Under the Seven-Four Plan, there is no such dilution of votes. Every vote in Virginia Beach counts equally since all candidates are elected by a city-wide vote. As the District Court specifically found, the city has been reapportioned in an intelligent and realistic manner (R. 114):

"The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. . . .

"The fact that three of the eleven council members must come from the less populated boroughs does not, standing alone, amount to invidious discrimination where they are elected by the voters of the entire city."

CONCLUSION

While the original plan of councilmanic representation at Virginia Beach permitted 22% of the people to elect eight of eleven or 73% of the councilmen, the Seven-Four Plan places the council under the control of the majority of the people. At the same time this plan offers qualities deemed essential for this unique city which no other constitutional plan can provide.

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and the judgment of the United States District Court for the Eastern District of Virginia affirmed.

Respectfully submitted,

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Supreme Court of the United States

Office Supreme Court, U.S.
FILED

OCTOBER TERM, 1966

No. 958

HANK AVERY,

against

MIDLAND COUNTY, TEXAS, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY,
NEW YORK, et al.,

Appellants,

against

I. WILLIAM BIANCHI, JR., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 430

JAMES SAILORS, et al.,

Appellants,

against

BOARD OF EDUCATION OF THE COUNTY OF KENT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF MICHIGAN

No. 624

EARLE C. MOODY, et al.,

Appellants,

against

RICHMOND M. FLOWERS, et al.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF ALABAMA

No. 724

FRANK A. DUSCH, et al.,

Appellants,

against

J. E. CLAYTON DAVIS, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE

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THE OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW YORK

IN SENATE
JANUARY 10, 1901

Supreme Court of the United States

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BRIEF OF THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK AS AMICUS CURIAE

Interest of the Amicus

The Attorney General of the State of New York is
vitaly interested in the above appeals insofar as their dis-

position may affect the future structure of municipal and county government.

Numerous suits have been instituted in the courts of our State to compel the reorganization of county boards and other local legislative bodies in accordance with the principle set forth in *Reynolds v. Sims*, 377 U. S. 533 (1964). The New York State Office For Local Government reports that a total of 25 counties of the 62 counties in the State have been involved in such litigation. City legislative bodies have been involved in similar litigation to a lesser degree.

The most recent bulletin of our Office For Local Government (Feb. 28, 1967) also indicates that, in the November, 1966 general elections alone, reapportionment plans were considered by referendum in 17 counties. At such elections, twelve plans were approved, five disapproved. As to the latter five counties, action is now being taken to formulate new plans. The local government report states, too, that 13 counties are currently operating with reapportioned legislative bodies including three which have adopted weighted voting plans in November, 1966 and nine in which interim weighted voting has been imposed by court order.

We need not burden the Court with further statistics to demonstrate the need to restore order to local government in New York, as well as other States; and to remove any doubt as to whether, *and to what extent*, this Court intends the principles stated in *Reynolds* to be applicable to county boards and other forms of local government.

The Attorney General of the State of New York, accordingly, files this brief as *amicus curiae* pursuant to Rule 42 of the Revised Rules of this Court.

Position of the New York Attorney General

(1)

We are informed that the United States Solicitor General, through an *amicus* memorandum filed (March, 1967) in *Avery v. Midland County Texas* (No. 958, Oct. Term, 1966), is expressing doubt that a three-judge statutory court was properly convened in *Board of Supervisors of Suffolk County v. Bianchi* (No. 491).

The Attorney General has abstained from active participation in earlier stages of the Suffolk County litigation (No. 491) since it has not concerned the constitutionality of any statute which has state-wide application. That action deals with a provision of the Suffolk County Charter (§ 203), in effect only in a single county of the State.

It further appears from the memorandum for the United States as *amicus curiae* that it is quite doubtful that a three-judge statutory Court was properly convened in No. 624. Since, as we have indicated (*supra*), the New York courts have encountered voluminous litigation involving the question of whether and to what extent county governing boards are to be controlled by this Court's ruling in *Reynolds v. Sims*, *supra*, and related cases, we support the suggestion of the United States Solicitor General (p. 6) that the Court may wish to grant certiorari in the Texas case (No. 958) and set it for argument along with the others cases to determine these questions at this time.

(2)

The New York Court of Appeals has already held that the principle stated in *Reynolds v. Sims*, *supra*, is applicable to local legislative bodies. *Seaman v. Fedourich*, 16 N. Y. 2d 94, 101 (1965). It has further held that the courts of New York "obligated as they are to uphold the Federal Constitution as well as the State's Constitution—whose equal protection clause * * * is as broad in its cover-

age as that of the Fourteenth Amendment * * * are vested with jurisdiction of actions brought to vindicate the right to equal representation" (16 N. Y. 2d 94, 102).

In view of the holding in the *Seaman* case, which has been consistently followed by the lower courts in New York, the Attorney General advocates in an appropriate case in this Court (the U. S. Solicitor General suggests No. 958), the extension of the "one person, one vote" principle to local legislative bodies. It has already been so extended in numerous New York cases. See, for example, *Goldstein v. Rockefeller*, 45 Misc. 778 (S. Ct., Monroe Co., 1965), where this office urged (pp. 782-783) such extension of the *Reynolds* principle. See also *Town of Greenburgh v. Bd. of Supervisors of Westchester County*, 49 Misc. 2d 116 (Sup. Ct., West. Co., 1966) 51 Misc. 2d 168 (1966); and — Misc. 2d — (reported with deletions, 157 New York Law Journal, No. 29, p. 18, Feb. 10, 1967) where former Presiding Justice NOLAN approved, in principle, reapportionment plans providing for both weighted voting and multi-member districts, as methods of effectuating the "one person, one vote" principle.

(3)

We urge, however, that this Court, in extending the principle of "one person, one vote" to local legislative bodies, permit adequate variety in the manner in which local governments may comply with this principle. The New York rule set forth in the *Seaman* case (*supra*) does not preclude local governments in New York, which have been granted a considerable degree of "home rule" power from adopting many forms of local government, including those which provide for modified weighted voting, to achieve compliance with the principles of the *Reynolds* case. Even one of the most enthusiastic advocates of this Court's decision in *Reynolds* has recognized that this Court

* See New York Constitution, Art. IX, § 8; and New York Municipal Home Rule Law (McKinney's Cons. Laws of New York, Book 35-C).

has "reserved to the states the traditional room for experimentation and maneuver". McKay, *Reapportionment* (1965), p. 254.

The leeway required for variety in providing fair representation of voters in local governmental affairs was recognized by the three-judge Court convened in *Blaikie v. Wagner*, 258 F. Supp. 364 (D.C.N.Y., 1965). That Court held that the *Reynolds* principle did not prevent a city-wide limited voting system designed to afford representation to a minority party in each county of the city. More recently, this need for variety was recognized in the latest opinion in the Westchester County case.* See also, Dixon,

* In recognizing the need for an element of discretion in the manner in which county governments shall conform to the principle of "one person, one vote", Justice NOLAN stated (157 N.Y.L.J. *supra*, p. 18):

"Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another (cf. *Reynolds v. Sims*, *supra*, 377 U. S. 533, 578; *Swann v. Adams*, *supra*). The equal protection clauses do not require the application of rigid rules in all cases of legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between state legislative bodies and county board of supervisors which justify a different approach to county reapportionment problems, than that which has been approved, so far with respect to state plans. The composition of boards of supervisors has been provided for by state laws presumably for reasons which the Legislature considered sufficient, and while those laws may be superseded under home rule powers, or charter provisions there is no reason why a board of supervisors should not attempt to comply with them in so far as it may be possible to do so if that purpose can be effected without violation of the constitutional rights of the citizens of the country. The towns and the cities are political subdivisions of the county, and large or small, each has its problems which it does not share with neighboring towns, or cities, and in which its neighbors may have no interest whatsoever."

**Reapportionment Memorandum on Floterial Districting
Population Variances Among States, And Additional Ele-
ments of Fair Representation" (Dec. 5, 1966), pp. 31-34**

Dated: New York, New York, March 15, 1967.

Respectfully submitted,

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MAR 31 1967

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 430

SAILORS, *Appellant*,

v.

BOARD OF EDUCATION OF KENT COUNTY, *Appellee*.

No. 481

BOARD OF SUPERVISORS OF SUFFOLK COUNTY,
NEW YORK, *et al.*, *Appellants*,

v.

I. WILLIAM BIANCHI, JR., *et al.*, *Appellees*.

No. 624

MOODY, *Appellant*,

v.

FLOWERS, *Appellee*.

No. 724

DUSCH, *Appellant*,

v.

DAVIS, *Appellee*.

**BRIEF OF COUNTY OF NASSAU
AS AMICUS CURIAE**

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No. 624

MOODY, *Appellant*,

v.

FLOWERS, *Appellee*.

No. 724

DUSCH, *Appellant*,

v.

DAVIS, *Appellee*.

**BRIEF OF COUNTY OF NASSAU
AS AMICUS CURIAE**

Statement

A. Interest of Nassau County.

Issues of vital concern to Nassau County, New York are raised in these actions concerning (1) the applicability to local legislative bodies of the principle of "one-man, one-vote" enunciated by this Court in *Reynolds v. Sims* and companion cases, and (2) the constitutionality in the *Bianchi* case of a permanent scheme of weighted voting for the legislative body on the county level. On the issue of weighted voting, Nassau County has a particularly sub-

stantial interest since its Board of Supervisors, the County's legislative body, has operated under a weighted voting system since 1938. No other local legislative body has utilized this device on a permanent basis or has shared this unique experience for such a long period.

In the interest of fair and effective representation on the county level for the 1,400,000 residents of Nassau County, Eugene H. Nickerson, as County Executive and Chairman of the Board of Supervisors, has directed the County Attorney, as the County's authorized law officer, to sponsor this brief in these cases in behalf of the County of Nassau.

B. Position of Nassau County.

It is the position of Nassau County that the sound constitutional principle enunciated in *Reynolds*, requiring districts of substantially equal population to achieve fair and effective representation for all citizens on the state level, applies with equal force to local governing bodies elected from districts, such as county boards and city councils.

Weighted voting authorized by the federal district court in *Bianchi* is not deemed to be an appropriate permanent device and doubt is raised as to its constitutional validity.

Insofar as the jurisdictional question is concerned, it is the view of Nassau County that the three-judge court was properly convened in the *Bianchi* case.

Introduction

The emergence of the county as the dominant, basic and most common unit of local government in New York State is nowhere better illustrated than in the case of both Nassau and Suffolk Counties. Long antedating the present concern for strong county government to deal with rapidly

increasing areas of county responsibility, Nassau County adopted a charter form of government in 1936 (L. 1936, ch. 879) providing for a county executive and permitting more effective methods for coping with constantly increasing demands being made on county governments. Nassau County was the first charter county in New York State and one of the first in the United States.

Suffolk County adopted its charter in 1958 (L. 1958, ch. 278) in its program to modernize its local government in order to deal more effectively with its rapid population expansion and attendant problems of suburbanization and urbanization.

Nassau County, with a population in 1960 of 1,300,171 (a population larger than fifteen states according to 1960 census figures), and Suffolk County with a population of 666,784 in 1960, are obviously significant and substantial units of local government. Moreover, counties generally throughout the state "have been an integral part of New York's governmental structure since early colonial times, and the many functions performed by the counties today reflect both the historic gravitation toward the county as the central unit of political activity and the realistic fact that the county is usually the most efficient and practical unit for carrying out many governmental programs." *WMCA, Inc. v. Lomenzo, et al.*, 377 U.S. 633, 761-62 (1964) (dissenting opinion).

At issue here, therefore, is whether the constitutional principle that requires a state legislature to be apportioned on a population basis to achieve fair and effective representation for all citizens should be extended to governing bodies of local government.

- I. A three-judge court was properly convened in the *Bianchi* case to decide the constitutional validity of statutory provisions having general statewide application.

The jurisdiction of the three-judge court that was convened to hear the *Bianchi* case and had retained jurisdiction and held many hearings during the past five years has been questioned. See Memorandum of the Solicitor General in support of the Petition for a Writ of Certiorari in *Avery v. Midland County, Texas, et al.*, No. 958, October Term 1966.

There is no disagreement with the Solicitor General's statement of the applicable law that the convening of a three-judge court is authorized "only when a State statute of general, state-wide application is challenged and sought to be enjoined" but is not proper "where only a local ordinance or a State statute of limited application" is involved. Memorandum of Solicitor General, *supra* at pp. 3-4. But the Solicitor General errs when he suggests that the constitutional challenge in this case is limited to a state statute of only limited application.

The composition of the Suffolk County Board of Supervisors provided by section 201 of the Suffolk County Charter (L. 1958, ch. 278) is an almost exact reenactment of, and in fact superseded, section 150 of the County Law, indisputably a statute of general state-wide application.

Section 201 of the Suffolk County Charter provides:

"The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county."

Section 150 of the County Law, from which the Suffolk County Charter provision was derived, provides:

"The supervisors of the several cities and towns in each county, when lawfully convened, shall constitute the board of supervisors of the county."

The only distinction between the two provisions is that the County Law provides for representation of cities on the board of supervisors. Since Suffolk County has no cities, no provision for representation from cities was made in its charter. The Suffolk Charter did not, therefore, effect any change in the manner in which members of the board of supervisors are composed. Thus, before and after the adoption of its charter, the Suffolk Board of Supervisors consisted of one supervisor from each of its ten towns, notwithstanding the substantial variations in the population of the towns. Each town elects one supervisor, as provided by section 20 of the Town Law, applicable to all towns throughout the state.*

At the time the three-judge court was convened in the *Bianchi* case in 1962, all of the fifty-seven counties in New York State, not including the five counties comprising the City of New York, utilized the identical method of selecting members of their boards of supervisors, either in compliance with the County Law in fifty-one counties or the charter law of the six counties that had at that time adopted a charter form of county government.** The charters of each of the six counties continued the same method of selecting members of the board of supervisors as that provided by the County Law.

* The Town of Hempstead (with a population of 728,625 in 1960) is represented by two supervisors on the Nassau County Board of Supervisors by virtue of section 41 of the Town Law.

** Of the 57 counties selecting members of their boards of supervisors in the same manner as provided by section 150 of the County Law, the only county then *not* providing for an equal vote for each supervisor was Nassau County, which since 1938 has used a weighted voting system. See County Government Law of Nassau County, §104 (L. 1936, ch. 879). Pursuant to section 263 of the Suffolk Charter, each supervisor has one vote; section 153(4) of the County Law provides that action of the board of supervisors shall be taken by the affirmative vote of a majority of the total membership of the board.

The County Law is, of course, a statute of general state-wide application; the composition of the boards of supervisors of at least 50 counties in the state was governed thereby at the time the three-judge court was convened. In addition, the then six charter counties, including Suffolk, utilized the very same method prescribed by the County Law for selecting members of the boards.*

A determination that section 201 of the Suffolk County Charter is constitutionally invalid would result in the applicability to Suffolk County of section 150 of the County Law since section 103 of the Suffolk County Charter provides:

"All special laws relating to Suffolk county and all general laws of the state shall continue in full force and effect except to the extent that such laws have been amended, modified or superseded in their application to Suffolk county by enactment and adoption of this charter." (Emphasis supplied.)

To the extent that a provision of the Suffolk Charter is invalidated, the County Law, as the general state law, would be substituted and continued in its place. In such event, it may be deemed that the invalid 1958 charter provision never effected a repeal or superseded the County Law which, prior to that time, governed the manner in which the county board was composed. See *e.g.*, *Matter of Markland v. Souly*, 203 N.Y. 158, 166 (1911) ("the section of the charter as it existed before the amendment must be deemed to remain in force"); *People ex rel. Farrington v. Mensching*, 187 N.Y. 8, 22-3 (1907); *People ex rel. Smith*

* Since the commencement of the *Bianchi* action, two other counties (Herkimer and Schenectady) have adopted charters, and nine others have adopted local legislation relating to apportionment of their county legislative body. These eleven counties now use a mode of selecting members of the county boards of supervisors or of allotting votes thereon which differs from that provided by the County Law.

v. *Schiellein*, 95 N.Y. 124, 131 (1884); McK. Statutes, §377. See also, *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

Thus, if section 201 of the Suffolk Charter is deemed constitutionally invalid, then section 150 of the County Law must fall as well. Every county in New York State outside of New York City would thus be vitally affected.*

Inasmuch as section 201 of the Suffolk County Charter and section 150 of the County Law are not only virtually identical but also so highly interdependent, it must be concluded that at issue here is a law of general state-wide application. The practicality of this conclusion was recognized by the state courts when both section 201 of the Erie County Charter, a re-enactment of the County Law provisions concerning the selection of members of boards of supervisors, and section 150 of the County Law were declared constitutionally invalid. *Graham v. Board of Supervisors*, 18 N.Y.2d 672 (1966).

A clear distinction exists between the *Bianchi* case and *McMillan v. Wagner*, 239 F. Supp. 32 (S.D.N.Y. 1964), where the court properly found "that [the New York City] charter applies only to New York City. It is not a state statute of state-wide application." Similarly, *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), concerned a situation unique to Prince Edward County. But here, section 201 of the Suffolk County Charter or virtually identical provisions applied, at the time this action was instituted, not to one but to all the 57 counties outside of New York City. Unlike *McMillan* and *Griffin*, at stake in the *Bianchi* case is a state-wide system of general application and not a situation of merely local importance unique only to a single city or a single county.

* The extreme population variances existing in almost every county in the state is documented in tabular form in Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21, 51-54 (1965).

II. The principle of "one-man, one-vote" enunciated by this Court in *Reynolds v. Sims* applies to the governing bodies of counties and other local governments and requires that such bodies be apportioned substantially on a population basis.

The establishment by this Court of the doctrine of "one-man, one-vote" was a milestone in achieving "full and effective participation by all citizens" and "fair and effective representation for all citizens" in state government. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). No argument should be sustained which would deny the "inalienable right" to effective participation in the political processes to citizens of local governments that possess and exercise important and substantial legislative powers.

The federal and state courts, with almost unanimity, have unhesitatingly applied the *Reynolds* principles to county and city legislative bodies. *E. g.*, *Graham v. Board of Supervisors of Erie County*, 18 N.Y. 2d 672 (1966); *Seaman v. Fourdich*, 16 N.Y. 2d 94, (1965); *Brower v. Bronkema*, 377 Mich. 616 (1966); *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123 (4th Cir. 1965). The sole exception, *Avery v. Midland County, Texas*, 406 S.W. 2d 422, 426 (1966), was grounded on the determination that the "legislative functions [of the county commissioners court] are negligible"—a situation which, if true in Texas, is clearly not the case in New York State, where county legislative bodies have substantial legislative powers.

In New York State, it is the board of supervisors which exercises the legislative function in the county. The Suffolk County Charter provides, in section 201, that the board of supervisors "shall be the legislative and policy determining body of the county." Similarly, the Nassau County Charter, section 102, refers to the board of supervisors as "[t]he governing body of the county." That all county legislative bodies shall be elected by the people

is constitutionally mandated. "Every local government . . . shall have a legislative body elected by the people thereof." N. Y. Const., art. 9, §1(a).

County boards possess vast local law power to enact legislation of equal dignity with state laws. Since 1846, when the State Constitution was first amended to allow the Legislature to confer local law powers on county boards, efforts have been successful to expand the local legislative authority of the county boards to include more and more areas of public concern. See *e.g.*, L. 1875, ch. 482; N. Y. Const. art. 3, §27 (1894); N. Y. Const. art. 9, §4 (1938). At the present time, the county boards have extensive home rule powers and may adopt and amend local laws that relate to "its property, affairs or government" [N. Y. Const. art. 9, §2(c)(i)] as well as laws not so relating covering substantial subjects [*Id.* at §2(c)(ii)]. Although many of the home rule powers set forth in the State Constitution are self-enacting, the Legislature has adopted supplementary legislation enumerating the numerous areas in which county boards may legislate. See Municipal Home Rule Law, §10, subs. 1(i), 1(ii) (a) and (b). The authority of a county board of supervisors to oversee county business and affairs by ordinance and resolution is similarly extensive. See, *e.g.*, Article 5 of the County Law.

The significant power vested in the board of supervisors to adopt a charter form of county government subject to approval by the people [Municipal Home Rule Law, art. 4, §§33(1), 33(7)(b)] and the scope of the home rule powers permitted to be contained in such a charter or an amendment thereto [*Id.* at §§33(2), 33(3)] are an acknowledgment that the county is the central unit of local governmental activity. The Governor, in his message approving the then new County Charter Law (L. 1959, ch. 569) authorizing a charter form of government for all counties (subsequently superseded by substantially similar provisions in Article 4 of the Municipal Home Rule Law), stated that:

"It is the intention of this new article to permit county home rule to be used as an instrument for the more efficient handling of the varying problems of different counties . . . or to assume powers which have been exclusively those of the state.

• • •

"This legislation should enable counties to meet more effectively the ever-increasing demands that are being made on local government." McK. 1959 Session Laws of New York, 1753-54.*

The dynamic increase of services offered by Nassau County and its acceptance of governmental responsibility on the local level in diverse areas of public concern is illustrative of the substantial legislative powers vested in the county unit. As recent examples of the expanding spheres of activity engaged in, Nassau County has created by local law several new governmental departments to meet the diverse needs of the residents of the County, including, for example, the first County Commission on Human Rights in New York State (Local Law No. 5, 1963), a Department of Labor (Local Law No. 1, 1963) and a Department of Commerce and Industry (Local Law No. 1, 1964). Nassau County has also, by local law, placed all employees of the Sheriff's Office under civil service and eliminated the Sheriff as an elected officer with provision for his appointment by the County Executive (Local Law No. 14, 1965). The broad power of the county board is further typified by the scope of activities requiring local

* Similarly, the increasing stature of county governments was recognized by the Attorney General of New York State when he stated that the County Charter Law "providing opportunity for the fundamental reorganization of county governments by county residents has given the county an even greater role to play in the social, economic and political life of modern New York." *WMCA, Inc. v. Lomenzo, et al.*, 377 U. S. 633, 763, M. 18 (1964) (citing Brief for Appellate Secretary of State and Attorney General, No. 20, 1963 Term, pp. 42-43).

legislative action, in order, for example, to provide for the acquisition of land for the establishment of parks, recreation areas and the constant expansion of the network of county roads and highways, to support an active county hospital facility, to provide substantial health and welfare services, to construct sewer facilities, to establish a county airport and to support cultural activities.

The size of county budgets similarly reflect the important role of the county unit. The board of supervisors has the power to approve the county budget which, for the current fiscal year, in Nassau County totalled \$376,334,702.00, including \$190,853,504.00 for general fund expenditures, and in Suffolk County totalled \$113,181,400.00 including \$87,255,635.00 for general fund purposes.

A board of supervisors in New York State is clearly a body with grave and important legislative functions and responsibilities and assumes in certain respects what may ordinarily be considered state powers.

To deny equal representation on the county governing body to all county residents and to permit the invidious discrimination inherent in the present apportionment scheme for county legislative bodies* is as much a violation of the Equal Protection Clause, with the attendant deprivation of the right of each citizen to his inalienable right to effective participation in the political processes on the local level, as it was on the state level prior to this Court's historic pronouncements. The rationale and principles enunciated in *Reynolds* and companion cases apply to the legislative bodies of local governments.

* See Table of Representation on Boards of Supervisors in New York State in Weinstein, *The Effect of the Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L. Rev. 21, 51-54 (1965).

III. A permanent scheme of weighted voting for a local legislative body is violative of the Equal Protection Clause of the Federal Constitution.

The constitutionality of weighted voting as a permanent scheme for equalizing voting power is of concern to Nassau County as its governing body has been operating under a weighted voting system since 1938. County Government Law of Nassau County, §104 (L. 1936, ch. 879). The issue is raised in the *Bianchi* case since a permanent weighted vote plan for the board of supervisors was authorized by the Federal District Court and adopted at the last general election.

The Nassau County Board of Supervisors consists of six members representing the three towns and two cities of the County. As apportioned pursuant to the 1960 census, the range of voting strength is from 31 weighted votes for each of the two supervisors from the Town of Hempstead, with a population of 728,625, to two votes each for the supervisors from the City of Long Beach, population 25,654, and the City of Glen Cove, population 22,752.

While "weighted voting may be useful in rare cases as a stopgap to comply with the constitutional mandate [for a fair apportionment] when there is no time for a proper apportionment" (Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties & Other Forms of Municipal Government*, 65 Colum. L. Rev. 21, 46 [1965]), it is urged here that a permanent weighted voting system is not compatible with the constitutional requirements of the Equal Protection Clause prescribed in *Reynolds*. Nassau County's position on this issue is in accord with the conclusion reached by the courts of this state, including the Court of Appeals. See *Graham v. Board of Supervisors of Erie County*, 18 N.Y. 2d 672, 674 (1966), where the state's high court approved a weighted voting plan solely as a temporary measure:

"Although weighted voting has inherent defects, it does provide more of the attributes of equal representation than the existing apportionment of

the Erie County Board of Supervisors. This being so, we approve the weighted voting plan adopted by the board . . . *but solely as a temporary expedient*. The board is directed to draft a permanent plan based on the principle of 'one man, one vote.' '' (Emphasis supplied.)

See also, *Morris v. Board of Supervisors of Herkimer Co.*, 50 M. 2d 969, 273 N.Y.S. 2d 453 (Sup. Ct. 1966); *Shilbury v. Board of Supervisors of Sullivan Co.*, 46 M. 2d 837, 260 N.Y.S. 2d 931, 937 (Sup. Ct. 1965), *aff'd*, 25 A.D. 2d 688, 267 N.Y.S. 2d 1022 (3rd Dept. 1966).

Indeed, the federal and state courts have, with almost no exception, deemed weighted voting intrinsically unconstitutional as a permanent device. See cases cited in Weinstein, *supra*, 65 Colum. L. Rev. 21, 42-44. See also, *WMCA, Inc. v. Lomenzo et al.*, 238 F. Supp. 916, 923 (S.D.N.Y. 1965), *vacated as moot*, 384 U.S. 887 (1966). The independent judgment of the many courts that have considered and rejected permanent weighted voting plans for local legislative bodies reveals a basic aversion to the system, resulting to some extent from its unsuitability to our representative form of government.

The issue concerning a permanent apportionment scheme based on weighted voting is as much a matter of Fourteenth Amendment concern as was legislative districting in the state apportionment cases. In *Reynolds*, this Court stated that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" (377 U.S. at 555) and that "malapportionment can, and has historically, run in various directions." 377 U.S. at 567. However and wherever malapportionment exists, it is constitutionally impermissible under the Equal Protection Clause. Sophisticated as well as obvious malapportionment schemes were

thus declared violative of the Equal Protection Clause. Weighted voting is an apportionment device which may be deemed to debase or dilute a citizen's vote.

Weighted voting is not a "political" or otherwise "non-justiciable" issue. As in *Baker v. Carr*, 369 U.S. 186, 209 (1962), the issue of weighted voting "neither rests upon nor implicates the Guaranty Clause and . . . its justiciability is therefore not foreclosed . . ." No political question is involved because "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States which gives rise to the 'political question.'" *Id.* at 210. Involved here is the substantial question of whether an apportionment scheme based on weighted voting is violative of the Equal Protection Clause. While weighted voting has a certain surface simplicity which makes it attractive as a solution to attaining a fair apportionment, upon "careful judicial scrutiny" weighted voting emerges as a complex sophisticated uncertain device which may not permit attainment of the goal of "one-man, one-vote."

The constitutional defects of weighted voting are manifold. Basically, it fails to accomplish its purported objective of providing equality of voting power either on a theoretical or conceptional basis. See Banzhaf, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 Rutgers L. Rev. 317 (1965); *Morris v. Board of Supervisors of Herkimer County*, 50 M.2d 929, 932, 273 N.Y.S. 2d 453, 456 (Sup. Ct. 1966). Moreover, "weighted voting presents serious operational . . . objections." Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties & Other Forms of Municipal Government*, 65 Colum. L. Rev. 21, 45 (1965).

After an extensive computerized analysis undertaken pursuant to a grant from the National Municipal League and the Ford Foundation, it was concluded that "[i]n almost

all cases weighed voting does not do the one thing which both its supporters and opponents assume that it does: weighted voting does not allocate voting power among legislators in proportion to the population each represents because *voting power is not proportional to the number of votes a legislator may cast.*" Banzhaf, *supra*, at 318. (Emphasis in original.) The fallacy, frequently overlooked, is that the "more accurate" measure of a legislator's power is his ability "to affect the passage or defeat of a measure." *Ibid.*

The same computer-assisted analysis has led to the conclusion that "the Nassau County, New York, system of weighted voting is unconstitutional because half of the representatives have no power to affect legislative determinations" *Ibid.* "With all members present, only the three with the largest number of votes have any power to affect legislative outcomes. Any combination of two of the three will pass a measure and no measure will pass unless at least two of the three agree with it. No changes in the voting of any or all of the three smallest representatives will have anything other than a persuasive effect on the outcome of any proposal. They may as well stay home" *Id.* at 339. "Even in large bodies [such as the New Jersey Senate] there may be significant disparities, which may be magnified in the committees where so much of the legislative work is done." *Id.* at 340.

The unsuitability of weighted voting for Nassau County, the state's largest county outside of New York City, with a county board of only six members from three towns and two cities, representing 1,400,000 residents, has been demonstrated to apply to a similar extent to smaller counties with larger boards as well. An analysis made of a proposed weighted vote plan for Herkimer County, a rural county of under 70,000 population with twenty-one supervisors from a like number of towns, resulted in a similar conclusion to that reached for Nassau County:

"Weighted voting is not constitutionally acceptable as a permanent plan of reapportionment In this connection, with the consent of all counsel, a mathematical analysis was obtained by counsel for the Attorney General of New York from Mr. Banzhaf and clearly indicates the grave disparities which exist under weighted voting as proposed in Plan "B". For example, the Town of Newport has approximately ten percent (10%) less than the mean or unweighted average of the voting power based upon its population, but more than one hundred percent (100%) more voting power than the residents of the Town of Ohio. A voter in the Town of Manheim has a voting power over sixty percent (60%) greater than the average voter in Herkimer County and two hundred sixty percent (260%) more power in his vote than a citizen in the Town of Ohio. The seven representatives from the three largest communities, German Flatts, Herkimer and the City of Little Falls, cast, between them, 364, or well over half of the 673 total votes. *The other 18 members of the Board will be voices without impact or effect on legislation when these 7 representatives agree on any issue.* To plunge into a "mathematical quagmire", *Baker v. Carr*, 369 U.S. 186, 268, 82 S.Ct. 691, 7 L. Ed.2d 663 (1962) understood only by experts using computers, does not appear to this Court to be the path leading to equal representation of citizen voters in our local legislative bodies." *Morris v. Board of Supervisors of Herkimer Co.*, 50 M.2d 929, 932, 273 N.Y.S. 2d 453, 456 (Sup. Ct. 1965) (Emphasis supplied.)

Another constitutional infirmity of weighted voting is the practical operational effect of its implementation. Weighted voting will not resolve the inequality of representation that would result since so many important legis-

lative functions are not related to voting. As the court aptly noted, in *WMCA, Inc. v. Lomenso, et al.*, 238 F. Supp. 916, 923 (S.D.N.Y. 1965), *vacated as moot*, 384 U.S. 877 (1966):

"If voting were the only important function of a legislator, the scheme of fractional voting in Plans D and C would probably not offend "the basic standard of equality" among districts. But *legislators have numerous important functions that have nothing directly to do with voting*: participation in the work of legislative committees and party caucuses, debating on the floor of the legislature, discussing measures with other legislators and executive agencies, and the like. The Assemblyman who represents only one-sixth of a district can theoretically give each constituent six times as much representation in these respects as the Assemblyman who represents a full district. This disparity of representation persists even if the State is right in arguing that the Assemblyman with only one-sixth of a vote will carry only one-sixth as much political weight when he engages in these activities." (Emphasis supplied.)

Similarly, the Citizens' Committee on Reapportionment, in its report to the Governor, stated that:

"If *Reynolds* requires equality of legislative representation, it seems clear that many aspects of the legislator's activity cannot be weighted, so that the device creates distortion rather than equality. *Speaking on the floor, committee membership, eligibility for committee chairmanship, and voting bills out of committee, for example, cannot be weighted.* A district entitled to two votes, for example, may well be entitled to two heads as well so that a dilution

of legislative representation ensues when only one head and two votes are granted." N.Y. Joint Legislative Committee on Reapportionment, Report, Leg. Doc. No. 76, p.36 (1964). (Emphasis supplied.)

But even if the problems of committee assignments* and voting could be solved, other difficulties inherent in a weighted voting system would still exist. "It gives rise to unlimited speculation as to committee appointments, the allotment of time in debate and the effect of the voices to be heard." *League of Nebraska Municipalities v. Marsh*, 209 F.Supp. 189, 195 (D.Neb. 1962). "Serious human and practical problems exist in a system of weighted voting which limits its usefulness on a permanent basis The question arises as to whether a legislator from Little Falls is permitted to make 9 times as many speeches 9 times as many telephone calls and have 9 times as much patronage? When they serve on a committee together, does one legislator have 9 times as much power on that committee? If the weighted system is not followed on committee assignments then the disproportion which reapportionment seeks to correct is only partially corrected. If it is, meaningful representation by those who cast a small number of votes is lost. *Morris v. Board of Supervisors of Herkimer County*, 50 M.2d 929, 933, 273 N.Y.S. 2d 453, 456 (Sup. Ct. 1966).

However, no matter what procedures or rules are established in an attempt to minimize the defects of weighted voting, one uncontrovertible fact emerges. A district entitled to two or more votes and having but one man to cast them is under-represented. That one man cannot as effectively represent his constituency as would

* Section 154 of the County Law, applicable to Suffolk County, provides that "The board of supervisors may create standing committees for the purpose of aiding and assisting the board in the transaction of its business"

two or more is clear. It is extremely doubtful that one legislator can make the same contacts, hold the same number of working committee assignments, meet the same number of constituents, influence and persuade other legislators or command the same attention as would two or more legislators.

Weighted voting is constitutionally impermissible as a permanent apportionment scheme because "[w]eighted voting tends . . . to represent districts rather than people in reality" Lockard, *Achieving Fair Representation in New Jersey*, 88 N.J.L.J. 1 (Jan. 7, 1965).

True representative government requires that "one-man, one-vote" apply within the legislative body itself. In this respect, it has been aptly stated that:

"If we accept the democratic assumption that a body of equals with opportunity for free debate will generally reach a more favorable result than a body controlled by a single person who must, by hypothesis, be no better than the average, weighted voting will lead to less beneficial results than other forms of voting. The system is demeaning and frustrating to the able representative who is constantly overwhelmed by the voting power of a colleague whose influence and control are artificially increased."

"A deliberative democratic body—a legislature at its best—requires application of the concept of 'one-man, one vote' within the body itself, so that rational argument among equals can take place. The attributes that make for leadership in such a body—honesty, preparation on issues, intelligence, ability to weave principle and practicality together, and dedicated interest in other members and in the work at hand—should determine individual weight within the body." Weinstein, *The Effect of the Federal*

Reapportionment Decisions on Counties & Other Forms of Municipal Government, 65 Colum. L. Rev. 21, 45-6 (1965) (Emphasis supplied.)

A majority of the bi-partisan Nassau County Commission on Governmental Revision, after five years of intensive study of the structure of Nassau County's government, concluded that:

"But, entirely apart from the foregoing, weighted voting is not the equivalent of one man-one vote equal representation: it stifles the deliberative nature of the decision-making processes; it limits the effectiveness of the inter-change of persuasive debate; it places undue emphasis upon the individual supervisors, according their ideas significance related not to the quality of their ideas but to the weight of their vote. We believe that the deliberative, legislative and decision-making processes of the Board of Supervisors require that the relationship of its members towards one another be that of equals." Commission on Governmental Revision, *Final Report to the Board of Supervisors*, Dec. 12, 1966, p. 9.

A permanent weighted voting plan for a county legislative body does not comply with the standards of fair and equitable representation required by the Fourteenth Amendment. Thus, the principle and rationale of the federal court determination that a weighted or fractional voting plan for a state legislature "violates the XIV Amendment of the United States Constitution" (*WMCA, Inc. v. Lomenzo, et al.*, 238 F. Supp. 916, 923 [S.D.N.Y. 1965], *vacated as moot*, 384 U.S. 887 [1966]) should be applied to local legislative bodies. This conclusion is in accord with that reached by the New York Court of Appeals in *Graham v. Board of Supervisors of Erie County*, 18 N.Y. 2d 673 (1966).

CONCLUSION

For the foregoing reasons, the principle of "one-man, one-vote" should be held to apply to the governing body of local governments; weighted voting does not meet the requirements of the Equal Protection Clause and should be declared invalid as a permanent device.

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March 29, 1967,

**BRIEF
AMICUS
CURIAE**

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In the Supreme Court of the United States

(CL) 10 OCTOBER TERM, 1934

No. 430

JAMES SAILORS, ET AL., APPELLANTS

BOARD OF EDUCATION OF THE COUNTY OF KENT, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN**

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK,

ET AL., APPELLANTS

L. WILLIAM BIANCHI, JR., ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK**

No. 694

EARLE C. MOODY, ET AL., APPELLANTS

v.

RICHMOND M. FLOWERS, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA**

No. 794

FRANK A. DUSCH, ET AL., APPELLANTS

J. E. CLAYTON DAVIS, ET AL.

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

1. No. 430. The majority and dissenting opinions
of the three-judge district court (R. 430; 198-219,

220-222¹⁾ are reported at 254 F. Supp. 17 (W.D. Mich.).

2. No. 491. The opinion of the three-judge district court (R. 491; 189-198) is reported at 256 F. Supp. 617 (E.D.N.Y.).¹ A prior opinion of the three-judge district court (R. 491; 123-136) is reported at 238 F. Supp. 997 (E.D.N.Y.) and the earlier opinion of a single district judge (R. 491; ~~108~~-111) is reported at 217 F. Supp. 166 (E.D.N.Y.).

3. No. 624. The majority and dissenting opinions of the three-judge district court (R. 624; 56-64, 65-71) are reported at 256 F. Supp. 195 (M.D. Ala.).

4. No. 724. The opinion of the Court of Appeals for the Fourth Circuit (R. 724; 116-122) is reported at 361 F. 2d 495. The prior opinions of the district court (R. 724; 74-77, 78-82, 105-115) are unreported.

JURISDICTION

1. No. 430. The order of the three-judge district court, dismissing the complaint, was entered on May 2, 1966 (R. 430; 223-224). A notice of appeal to this Court was filed on June 16, 1966, and probable jurisdiction was noted on December 5, 1966 (R. 430; 224-225, 226). The jurisdiction of this Court is grounded upon 28 U.S.C. 1253.

¹ In order to avoid confusion, since the government is filing one brief in the four instant cases, citations to the records will include the number of the case involved. The case numbers will appear immediately after the capital "R." and before the page numbers being cited.

A later, unreported per curiam opinion is not printed in the Record, but is contained in the Appendix to the Jurisdictional Statement filed in No. 491 (J.S. 491; 18a-19a).

2. No. 491. The judgment of the three-judge district court was entered on June 15, 1966 (R. 491; 198-199). Notices of appeal to this Court were filed on June 30, 1966, and probable jurisdiction was noted on December 5, 1966 (R. 491; 216-219, 219-223). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

3. No. 624. The order of three-judge court, dismissing the cause, was entered on June 10, 1966 (R. 624; 72). A notice of appeal to this Court was filed on August 5, 1966, and probable jurisdiction was noted on December 5, 1966 (R. 624; 148-153, 159). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

4. No. 724. The judgment of the court of appeals was entered on May 30, 1966 (R. 724; 123). A notice of appeal to this Court was filed on August 26, 1966 (R. 724; 124-125), and, on January 9, 1967, an order of this Court set the case for argument along with the other three cases, with the question of jurisdiction postponed to the hearing on the merits (R. 724; 127). The jurisdiction of this Court rests upon 28 U.S.C. 1254(2).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

*** No State shall *** deny to any person within its jurisdiction the equal protection of the laws.

Section 294a of the Michigan School Code (Mich. Stat. Ann., Sec. 15.3294(1)) is set out in Appendix A-I *infra*, pp. 131-132. Sections 261 and 203 of the

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Suffolk County Charter (Ch. 278, Laws of New York, 1958) are set out in Appendix A-II *infra*, p. 133. Act No. 9, Sec. 2, Acts of Alabama, Reg. Sess., 1957, is set out in Appendix A-III *infra*, pp. 134-135. Sections 3.01 and 3.02 of the Charter of the City of Virginia Beach (Ch. 147, Acts of Assembly of Virginia, 1962, as amended by Ch. 39, Acts of Assembly of Virginia, 1966) are set out in Appendix A-IV *infra*, p. 136.

QUESTIONS PRESENTED

1. Whether the equal-population principle enunciated in *Reynolds v. Sims*, 377 U.S. 533, and other cases involving State legislative apportionment, is applicable as well to the district-based election of members of the governing boards of local governmental units, such as counties, municipalities, and school districts.

2. Whether that principle, assuming its applicability at the local level, (1) prohibits the use of an election scheme under which members of a local governing board are elected at large but must reside in and declare their candidacy from residence districts, where such residence districts are grossly disproportionate in population, and (2) prohibits the use of a two-step election scheme under which members of a local governing board are elected by an

Only those statutory provisions dealing directly with the manner of selection and the districting for and apportionment of members of the governing bodies involved in these four cases have been set out. Additional provisions not directly involved, such as those defining the powers and duties of the respective governing bodies, are contained in the respective records and presumably will also be set out in the briefs of the parties.

assembly whose members are popularly elected by districts, where such election districts are grossly disproportionate in population.

INTEREST OF THE UNITED STATES

Like *Baker v. Carr*, 369 U.S. 186, *Gray v. Sanders*, 372 U.S. 368, *Wesberry v. Sanders*, 376 U.S. 1, and *Reynolds v. Sims*, 377 U.S. 583, and the companion State legislative apportionment cases, the instant cases involve a most important and fundamental right in a democratic society—the right to full and fair participation in government by all citizens on an equal basis. In all of the above-cited cases, because of the far-reaching issues involved, the United States participated *amicus curiae*. We have a similar interest here.

In our view, a citizen's right to a properly weighted vote in the election of members of local governmental bodies is no less important than in the election of State legislators and congressmen. Activities of local governments affect citizens most directly, and involve matters of great significance to millions of Americans. Many programs of the federal government are administered by and through local governments, and billions of dollars of federal funds are provided for their accomplishment. Urbanization and population growth have resulted in a great expansion in demands for governmental services at the local level. Malapportionment at the local governmental level weakens the voice of certain citizens in the processes of these bodies, and dilutes the weight of their vote simply because of where they happen to reside. Malapportionment at the local level may also in part frustrate the intent of

Congress in enacting the Voting Rights Act of 1965, and dim the bright promise of that legislation for many newly enfranchised citizens.

Thus, the interest of the United States in these cases is that of millions of American citizens who are presently denied or may be denied, through malapportionment at the local level, full and effective participation in the processes of the various units of local government. It is the position of the United States that, as a matter of constitutional principle, logic, and sound policy, the equal-population principle of *Reynolds v. Sims* applies to local governmental bodies whose members are elected from districts, and requires that those districts be substantially equal in population.

STATEMENT

These four cases come from four different States and involve four different units and three different forms of local government. Nevertheless, their similarities, factual as well as legal, overshadow their differences and, considered together, they present an excellent framework for deciding the central issue here raised.

In each case the complaint was brought by a group of residents, taxpayers and voters of a political subdivision of the State against various State and local officials. In each case the plaintiffs sought a declaration that the statute or charter pursuant to which the members of the particular governing body were elected, by providing for their election on a basis which failed to accord even approximately equal

wright to the vote of each elector, deprived the plaintiffs of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. They also sought appropriate injunctive and other relief.

Factually, the principal features common to all four cases are: (1) the existence of a unit of local government exercising substantial powers and extending its authority over the plaintiffs and others similarly situated; (2) the election of the members of the governing board of the local unit from prescribed districts or through analogous election schemes; and (3) a system of districting which, by virtue of population disparities, accords the plaintiffs a substantially diluted and debased vote, when compared with the weight of the vote of citizens living elsewhere within the unit, in electing members to the same representative body.

1. No. 491.* Suffolk County is governed by a charter adopted by the electors of the county and incorporated into the New York Laws by the State legislature.* Under this charter, the executive authority for each town in the county is an *ex-officio* member of the County Board of Supervisors. Thus, in effect, the voters in each of the 10 towns in Suffolk County elect one member of the 10-man County Board. According to the 1960 census, the population of the 10 towns varied from a high of 172,956 in Islip to a low of 1,312 in Shelter Island.

* For convenience and simplicity, the four cases will be referred to throughout by their respective docket numbers, instead of names.

* Laws of New York, 1958, Ch. 278, Secs. 201-208.

The Board exercises general legislative authority over all matters of county government delegated by the State, including police protection, public works, health and welfare, zoning and planning, and civil defense. It also has the power to make appropriations, levy taxes, and incur indebtedness, and is the policy-determining body of the county.

This action was instituted in July 1962 in the United States District Court for the Eastern District of New York. On February 1, 1965, a three-judge district court, convened at the request of the plaintiffs, found the Board of Supervisors to be an "invidiously disproportionate system" and denied the motion of the defendants that the plaintiffs' action be dismissed. At the same time, the Court denied the plaintiffs' motion for an injunction against the continued operation of the Board, pending legislative or other political action to correct the inequities complained of, and retained jurisdiction (R. 491; 137-138). An appeal of that order by the defendants was dismissed by this Court for want of jurisdiction, in *Griffing v. Bianchi*, 382 U.S. 15, presumably because the order below was not a final one. Upon reapplication by the plaintiffs, as provided in the prior order, the district court, on June 15, 1966, ordered the defendant Board of Supervisors to proceed, under an interim arrangement by which the votes of the supervisors would be weighted according to the populations of the districts from which they were elected, to adopt and submit to the electorate a constitutionally valid, permanent plan of apportionment (R. 491; 198-199).

2. No. 624. The governing body for Houston County, Alabama, is called the Board of Revenue and Control. The Board has six members, five who are elected by districts established by the State legislature, and the Judge of Probate, elected at large, who serves as *ex-officio* chairman. According to the 1960 census, approximately 61 percent of the population of Houston County reside in District No. 5, which is coterminous with the city of Dothan and located in the center of the county. The remaining 39 percent are assumed to be fairly evenly distributed among the other four districts, in roughly the same ratios as the distribution of registered voters.*

The legislation creating the Board conferred upon it "all the general authority, power and duties now provided, or which may hereafter be provided to Boards of Revenue or Commissioners Courts, under the general laws of the State of Alabama." These powers include authority over the roads, bridges and causeways, responsibility for sanitation, public welfare and general health conditions, control over all county property, including courthouses, jails, hospitals and waterworks, and authority to own and lease real and personal property in order to promote industry and commerce. In order to carry out these functions, it has authority to levy and collect general and special taxes (subject to limitations set by the

* Acts of Alabama, Reg. Sess., 1957, No. 2.

Only registered voter, and not total population, figures were available for the other four districts.

* Acts of Alabama, Reg. Sess., 1957, No. 2, Sec. 7 (set out in J.S. 624; 33-34).

State), the power of condemnation, and authority to issue revenue bonds.

In a two-to-one decision, the three-judge district court denied the relief sought, apparently relying on three alternative grounds: (1) mere numerical imbalance, without a co-existing "serious wrong," does not amount to an invidious discrimination within the doctrine of *Baker v. Carr*; (2) a properly apportioned State legislature can provide an adequate remedy; (3) the Board does not have sufficient legislative powers to warrant the application of the rule of *Reynolds v. Sims* (R. 624; 61-63). In addition, the court below indicated its disposition to wait until this Court had definitively decided the question of whether *Reynolds* applies at the local level (R. 624; 62).

3. No. 724. The City of Virginia Beach was formed in 1963 by a consolidation of the former city of that name and all of what previously comprised Princess Anne County, Virginia. That consolidation and the charter under which the city is governed were approved by popular referenda and incorporated into the Virginia laws by the State legislature.¹⁰

The apportionment of City Council seats under the original charter, which allotted five members to the former City of Virginia Beach and six to the former boroughs of Princess Anne County, was found to be invalid by the United States District Court for the Eastern District of Virginia, on December 7, 1965. However, proceedings were stayed pending legislative action. Thereafter, the City Council submitted a new

¹⁰ Code of Alabama, Title 12, Secs. 11, 12, 16-19, 21-22, 177, 181, 185, 186, 191, 197, 300; Title 29, Sec. 3; Title 51, Sec. 71.

¹¹ Acts of Assembly of 1962, Ch. 147.

plan to the State legislature and the charter was amended.¹¹ Under the amended charter the council is composed of eleven members elected under the so-called "7-4 plan". Four members are elected by and from the city at large, and the other seven are elected by the city at large from among the residents of each of the seven boroughs established by the charter.¹² According to the 1960 census, the populations of these boroughs ranged from a high of 29,048 to a low of 733.

The charter granted by the State legislature confers upon the City Council all the powers previously possessed by both the City of Virginia Beach and Princess Anne County. Thus, the Council exercises general legislative authority, which includes the traditional municipal powers and functions and extends over what previously comprised an entire county.¹³

A three-judge court was convened at the request of the plaintiffs, but was dissolved before the ruling was made that the original consolidated council was unconstitutionally apportioned. After the legislature enacted the amended charter into law, the plaintiffs filed an amended complaint attacking the 7-4 plan. The district court found a compelling need for compromise during the period of transition from county to city government, and held that the 7-4 plan did not result in an invidious discrimination against

¹¹ Acts of Assembly of 1966, Ch. 89.

¹² This is not a unique method of election. At-large elections with district residence requirements are used to elect the governing bodies in 620 counties throughout the country. See note 24, *infra*, and the discussion in note 83, *infra*.

¹³ See also Code of Virginia, Sec. 15-77.1 through 15-77.70.

voters in the more populous residence districts (R. 724; 113-114). However, the Court of Appeals for the Fourth Circuit, in a unanimous decision, found that the 7-4 plan created disproportionate representation and a curtailment of selectivity and, therefore, violated the Equal Protection Clause. The court denied injunctive relief, in view of the proximity of elections, but ordered the district court to retain jurisdiction pending further legislative relief (R. 724; 122).

4. No. 430. The governmental unit involved in this case is the County, or Intermediate, School Board for Kent County, Michigan. The Board is created by the State, without the consent of the residents, to perform various administrative and legislative functions for the State Board of Education. Its authority includes the appointment of a county school superintendent, preparation of an annual budget and levy of taxes, distribution of delinquent taxes, recommendation of library books, conducting cooperative programs with other intermediate school boards, and employment of teachers for special educational programs. In addition, the Board may furnish services or conduct cooperative programs for the 39 "constituent" school districts within its jurisdiction.¹⁴ One of its more sensitive functions, and the one giving rise to this action, is the power to transfer areas from one school district to another.¹⁵

¹⁴ Mich. Stat. Ann., Sec. 15.3298(1).

¹⁵ Mich. Stat. Ann., Sec. 15.3461 *et seq.* Part of the relief prayed for in the complaint was the retransfer of certain areas from the Kentwood School District to the City of Grand Rapids School District. See note 96, *infra*.

The County School Board is not elected directly by the voters of the County. Instead, the voters of each of the 39 school districts in the county elect a Board of Education for that district.¹⁶ The five-man County School Board is elected by an assembly consisting of one representative from each Board of Education.¹⁷ Since each member of the assembly has one vote, the net effect is to accord each school district $1/39$ of the total voice in electing members of the County School Board. According to the 1960 census, the Grand Rapids School District had a population of 201,777, or about 55.6 percent of the total population of Kent County. Several school districts had a population under 150, the lowest being 99 (R. 430; 163).

In a two-to-one decision, the three-judge district court determined not to anticipate the application of the one-person, one-vote rule to local governments and ruled against the plaintiffs (R. 430; 220-222). That court did not decide the case on the basis of the peculiarities of the two-step election scheme, but viewed the issue presented as the broad one of the applicability of *Reynolds* and related cases at the local governmental level (R. 430; 221; see note 95, *infra*).

ARGUMENT

INTRODUCTION AND SUMMARY

Strictly speaking, the Court's decisions in the four instant cases will relate only to the districting ar-

¹⁶ See Mich. Stat. Ann., Secs. 15.3027, 15.3055, 15.3107, 15.3148, and 15.3188.

¹⁷ Mich. Stat. Ann., Sec. 15.3294(1). A similar assembly is used to approve the County School Board's proposed budget. Mich. Stat. Ann., Sec. 15.3298(1).

rangements for the local governmental bodies involved in these cases. But it would blink reality not to recognize that the constitutional question involved is a broad one and that the holdings here will have implications directly affecting the constitutionality of local government apportionment schemes generally. As we see it, the broad constitutional issue is simply whether the equal-population principle of *Reynolds v. Sims*, 377 U.S. 533, and companion and related cases applies to districting at the local level of government. Accordingly, we think it may be helpful, at the outset, to discuss somewhat generally the nature and functions of local governments in order to provide a more general framework for considering and resolving the broad constitutional question.

The variations in the functions, powers and organization of local governments appear so great as to make any categorical statement precarious.² However, a few generalizations are possible. For this purpose, the most workable definitions and classifications are those used by the United States Bureau of the Census, the most reliable and convenient source of information and statistics on local government. These definitions and classifications are generally acceptable for our purposes, and are adopted and used here.

²For a fuller discussion, see U.S. Department of Commerce, Bureau of the Census, 1962 Census of Governments, Vol. I, International Union of Local Authorities, Local Government in the United States, Recent Trends and Developments 1951; The Municipal Year Book 1966 (Nolting and Arnold ed.) See also the tables included in the Appendix (infra, pp. 127-130).

A local government is defined by the Bureau of the Census as:

*** [an] organized entity which, in addition to having governmental character, has sufficient discretion in the management of its own affairs to distinguish it as separate from the administrative structure of any other governmental unit."

For purposes of our discussion, we group local governments into three general classes: (1) Counties, municipalities, and townships; (2) School districts; (3) Special districts."

"In the Census Bureau's view, the critical factor is whether the unit has substantial fiscal and administrative autonomy. The power to tax is not, of itself, an essential element, nor is the method of selection—appointment or election—of the body exercising the unit's powers. 1962 Census of Governments, 15-17.

"According to 1962 Census of Governments, there were at that time some 91,185 local governments fitting this definition. As the table in Appendix D-I (*infra*, p. 137) shows, of these 91,185 local governments, 3,043 were counties (which figure increased to 3,049 by 1965), 17,997 were municipalities (a large majority of which were relatively small towns and villages), 17,144 were townships, 34,678 were school districts (which figure decreased to 28,814 by 1965), and 18,323 were special districts.

No useful generalization can be made about the size of the governing boards of these governmental units, since the variances from State to State and as between the different kinds of bodies is so great. For instance, county boards in some States are of fixed size, while others vary according to the number of cities, towns, etc., in the county, or, in some respects, according to the population of the subordinate units. Some bodies are as small as three, while others range up close to 100 members, and are thus larger than many State legislative bodies. Similarly, the terms of the members of local governmental bodies vary greatly, from as short as one year to as long as six or eight years.

These three units of local government constitute political subdivisions of the State, designed primarily to implement State legislation and State policies and to provide governmental services on the local level. There are, of course, a few characteristics which serve to distinguish these units one from the other. For example, counties and townships are usually established by the State without the consent of the residents, while municipalities are generally established by charters initiated and approved by those inhabiting the area to be incorporated. Municipalities in some States, and also occasionally counties, are organized pursuant to State constitutional or statutory provisions authorizing or conferring "home rule," and have powers of local self-government independent of the State in regard to matters of local concern. Municipal governments generally have broader legislative powers and responsibilities and more autonomy than county governments, while townships are frequently units of government for rural areas and have quite limited powers.² Patterns vary across the country as to terminology as well as powers, and depend to a considerable extent on the historical background.³ How-

²Included in the Census Bureau's category of townships, however, are "towns" in the New England States, New York, and Wisconsin, which in their nature and powers are more analogous to counties than to townships generally. See 1962 Census of Governments, 3.

³See, e.g., U.S. Department of Commerce, Bureau of the Census, *Governing Boards of County Governments: 1966*, 9-18 (Table 1), for a State-by-State delineation of the various names by which county governing boards are known.

ever, in the context of the instant problem, such differences are properly seen to be only a matter of emphasis. As a general matter, it is not inappropriate to characterize bodies exercising the powers of these units of government—county boards, city councils, and the like—as “little legislatures” and to classify them together.”

These governmental units ordinarily have the power to contract, the capacity to sue and be sued, the power of eminent domain, and various taxing powers—primarily, but not solely, involving the levying and collection of property taxes. Their legislative competence may cover some, or all, of the following areas: police and fire protection, zoning and planning, parks and recreation, libraries, hospitals and health services, public welfare, housing and urban renewal, water supply and sewage disposal, highways, streets and street lighting, and miscellaneous services. Where conferred, the governing body's lawmaking powers are generally exercised through the enactment of ordinances.

Of more direct relevance here, these units are almost always governed by elected bodies, although the method of election varies considerably. For counties and townships, the method is often determined by the State constitution or statutes, although sometimes the local unit has the option to change or to select its own system. The method of election for city councils is generally determined by the municipal charter.

²² See generally 1 McQuillin, *Municipal Corporations*, chs. 2, 3 (1949); 2 *id.*, chs. 4, 7-10 (1966).

percent elect all from districts, and 17 percent use a mixed system."

B. SCHOOL DISTRICTS

As a general rule, school districts are initially established by the State, subject to annexation, consolidation or subdivision at the initiative of the residents or by the State itself. Although they are a "single-function" unit, the importance of their role in local government and the breadth of their powers warrant analysis separately from the other special-function units."

School boards—the school districts' governing bodies—have corporate existence, generally determine their own budgets and levy taxes, and often have the power of eminent domain. In addition, they typically draw the boundaries for school zones within the dis-

*The Municipal Year Book 1966, 93-95. The 62-percent figure for at-large elections included 34 cities in which council members are nominated by districts.

"There has been a steady and dramatic decrease in the number of school districts in the United States in recent years. See 1962 Census of Governments, 4:

School year:	No. of school districts
1921-22	34,678
1930-31	30,054
1936-37	28,484
1951-52	27,355
1961-62	23,814

With the movement to consolidate school districts, particularly in rural areas, in many States, this trend is likely to continue in future years. Indeed, from 1962 to 1965, the number of school districts had further dropped from 34,678 to 23,814. The Council of State Governments, The Book of the States, 1966-1967, 287.

strict, determine school bus routes, control the acquisition and maintenance of plant and equipment, hire and promote faculty and administrative personnel, supervise the planning of curricula and extra-curricular activities, approve the purchase of texts and library books, authorize the use of school facilities for non-school functions and conduct programs to meet special educational needs. Some school boards function on a county-wide basis; others have a more narrowly circumscribed territorial jurisdiction.

No accurate statistics are readily available on the methods used in selecting school board members. However, it appears that over 95 percent are elected, the most notable exceptions being in certain large cities.* Moreover, the overwhelming majority of these are elected at large.**

C. SPECIAL DISTRICTS

Special districts exist apart from, and are superimposed upon, the regular and traditional governmental subdivisions. They are generally created through the action or at least with the approval of the residents or landowners in the district to be formed (which often cuts across city and county boundaries), and almost invariably under and pursuant to State statutes.

* See "Individual State Descriptions" in 1962 Census of Governments, 943 et seq. An estimate is that about 33,600 of the 34,678 are elected.

** A sampling of States having large numbers of elected school boards showed that about 90 percent of these are elected at large. States sampled were: California, Illinois, Kansas, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Washington, Wisconsin, and Wyoming.

These districts are generally created to perform a single function, although occasionally they have a broad spectrum of local governmental purposes. The most common functions performed by such units are fire protection (17.6 percent), drainage and water conservation (16.5 percent), soil conservation (13.4 percent) and urban water supply (8.2 percent), but parks and recreation, hospitals, libraries, cemeteries, police protection and a variety of other categories of activity may also be undertaken by special districts. Special districts often are financed through bond issues and, where appropriate, charges for their services, but 9,457 out of the 18,323 in existence in 1962 had the authority to levy property taxes.

The governing board of a special district may be appointed by the Governor or other public officials, or it may consist of county board members or other elected officials serving *ex officio*, or it may be elected by the residents or landowners of the district. In about 9,600, or just over half of such districts, board members are elected, and it appears that a large majority of these are elected at large.²⁰

Thus, while the total number of local governmental bodies is almost staggering, a quite smaller number of such bodies—about one quarter of the total—are

²⁰ See "Individual State Descriptions" in 1962 Census of Governments, 243 *et seq.* A sampling of a few States—Arizona, Arkansas, California, Idaho, Illinois, Nebraska, New Jersey, Oregon, Texas, and Washington—showed that 3,254 out of 4,936 elected governing boards (about 65 percent) are elected at large. A strong correlation exists between special district governing boards which are elected and those having the power to levy property taxes.

elected on a district basis." As we have seen, many of these bodies are not elected at all, and a large percentage of the others are elected at large, and not by districts. Subjecting local governmental bodies to the equal-population principle of *Reynolds* would not, therefore, involve the great numbers supposed if, as we assume, the requirement would apply only where the members are elected on a district basis."

In the succeeding pages we shall argue that, as a matter of consistent constitutional decision-making, logic, and sound policy, the equal-population principle developed in the State legislative apportionment cases is applicable to local governmental bodies whose members are elected by districts. Plainly, the Equal Protection Clause applies no less at the local than at the State level of government. No prior decisions of this Court have held the equal-population principle inapplicable to local governmental bodies. And no meaningful distinctions can be drawn between State legislatures and local bodies insofar as the relevance of the basic constitutional principles laid down in *Reynolds v. Sims* is concerned. In addition, the over-

"On the basis of available figures, coupled with rough estimates from samplings made of the situations in various States, it appears that only about 25 percent of the 91,185 local government governing boards are elected, in whole or in part, from districts or, while at large, under schemes including district residence requirements. See also the discussion *infra*, pp. 109-110.

"At best, therefore, claims of chaos and confusion because of the sheer number of bodies involved, if *Reynolds* is applicable at the local level of government, are grossly exaggerated, assuming such considerations are at all relevant. See the discussion in note 111, *infra*.

wholming trend in the State and lower federal courts is to hold the equal-population principle applicable at the local level. And, at least in the instant cases, there is no basis for distinguishing between the different kinds of bodies involved. Sound policy considerations support this result, when the role of local government in our democratic system is taken into account. Finally, we point out that, despite the large numbers of bodies potentially affected, applying the *Reynolds* principle at the local level would not create an unmanageable problem for the judiciary.

I. THE EQUAL-POPULATION PRINCIPLE OF REYNOLDS V. SIMS IS LOGICALLY APPLICABLE TO THE LOCAL LEVEL OF GOVERNMENT

In our view, the overriding issue in these cases is whether there are any distinctions between the State and local levels of government which make the equal-population principle of *Reynolds v. Sims*, 377 U.S. 533, inapplicable to local governmental bodies. In terms, of course, *Reynolds* and the companion cases construed and applied the Equal Protection Clause in regard to State legislative apportionment arrangements only. And no decision of this Court has definitively settled the question with respect to the local, as distinguished from the State, level of government. Properly considered, however, the applicability of the equal-population principle of *Reynolds* to the local level of government is compelled by logic and is required as a matter of consistent constitutional adjudication.

A. THE EQUAL PROTECTION CLAUSE APPLIES AT THE LOCAL
GOVERNMENTAL LEVEL

No serious question can be raised as to the general applicability of the Equal Protection Clause to governmental units subordinate to the State. Actions of such subordinate governmental units have traditionally been regarded as constituting "State action" for Fourteenth Amendment purposes. For example, in *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 577, the Court plainly stated:

For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission [emphasis added]. . . .

In *Cooper v. Aaron*, 358 U.S. 1, 16-17, in response to a contention that the actions of the school board and its agents were insulated from constitutional scrutiny since a local body and local officials were involved, the Court stated that "the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, . . . or whatever the guise in which it is taken . . ." Thus, what a State cannot constitutionally do directly, through its legislature, it cannot accomplish indirectly through the delegation of powers to political subdivisions. Again, in *Gomillion v. Lightfoot*, 364 U.S. 339, 344, the Court concluded that a State does not

have "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations * * *." Holding that a redrawing of municipal boundaries on a racial basis deprived Negroes of their right to vote in violation of the Fifteenth Amendment, the Court observed that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution" (*id.* at 344-345). A contrary conclusion, stated the Court, "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions" (*id.* at 345). Summarizing, the Court stated (*id.* at 347):

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Under these and a host of other pertinent authorities, it has been established beyond peradventure that governmental action on the local level, no less than on the State level, constitutes a subject appropriate for constitutional scrutiny under the Equal Protection Clause. Insofar as the general applicability of the Fourteenth Amendment to apportionment matters is concerned, therefore, it would seem to make little difference whether the apportionment at issue was one of State legislative seats or, instead, one involving a unit of local government.

B. NO PRIOR DECISIONS OF THIS COURT HOLD THE EQUAL PROTECTION CLAUSE INAPPLICABLE TO THE APPORTIONMENT OF LOCAL GOVERNMENTAL BODIES

It is occasionally suggested that this Court has previously determined that the Equal Protection Clause, and, more specifically, the equal-population principle of *Reynolds v. Sims*, is inapplicable to apportionment at the local level of government. Such a view is usually grounded on this Court's decisions in *Tedesco v. Board of Supervisors of Elections for the Parish of Orleans*, 339 U.S. 940; *Glass v. Hancock County Election Comm'n*, 378 U.S. 558, and *Griffing v. Bianchi*, 382 U.S. 15.²² It is perhaps enough to note that none of ~~these~~ cases involved a decision on the merits, and that any reliance on them for a broad rule as to the inapplicability of the *Reynolds* principle to local government is refuted by the Court's noting probable jurisdiction in the instant cases. Nevertheless, a short discussion of these cases seems warranted, and shows that any reliance on them is misplaced.

Tedesco involved a challenge to the districting scheme pursuant to which members of the New Orleans City Council were elected, and was grounded primarily on the Privileges and Immunities Clause of the Fourteenth Amendment. Finding no violation of constitutional rights, the State courts dismissed the action (see 43 So. 2d 514 (La. Ct. App.)). An appeal to this Court was dismissed for want of

²² See, e.g., *Johnson v. Genesee County*, 232 F. Supp. 567, 569, 579 (E.D. Mich.); *Detroit Edison Co. v. East China Township School District No. 3*, 247 F. Supp. 296, 300-301 (E.D. Mich.). Compare *Delosier v. Tyrone Area School Board*, 247 F. Supp. 30, 33-34, 36 (W.D. Pa.).

a substantial federal question in 1950, long before this Court's decision in *Baker v. Carr*, 369 U.S. 186. In *Baker* the Court distinguished *Tedesco* by stating that it "indicates solely that no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting" (369 U.S. at 235). *Tedesco* was of course one of the line of decisions following *Colegrove v. Green*, 328 U.S. 549; *Baker* completely undermined that line of authority, holding that apportionment suits should not be dismissed by federal courts for lack of jurisdiction or nonjusticiability or want of equity. In addition, Mr. Justice Clark, concurring in *Baker*, pointed out that "the Equal Protection Clause was not invoked in *Tedesco*" (369 U.S. at 252, n. 2). And any attempted reliance on the *Baker* characterization of the *Tedesco* districting scheme as having a "rational justification" is, in our view, precluded by the substantive standards enunciated in *Reynolds*. Indeed, the *Baker* Court's handling of *Tedesco* provides, if anything, an affirmative indication that apportionment on the local level is a proper subject for adjudication in the federal courts.

"In our view, questions as to subject-matter jurisdiction and justiciability in apportionment cases were definitively settled in *Baker v. Carr*, and under *Baker* no distinction can properly be drawn, in this regard, between an attack on the apportionment of State legislative seats and a challenge to districting for seats on a local governmental body. Almost invariably, the courts have so read *Baker*, and have taken jurisdiction and assumed justiciability in local government cases. Several courts have dismissed such suits for want of equity, however, or be-

Glass v. Hancock County Election Comm'n, 378 U.S. 558, although decided one week after this Court's decision in *Reynolds*, is likewise of little precedential force. *Glass* involved an appeal from a decision of the Mississippi Supreme Court upholding the dismissal for want of equity of a suit attacking the districting for seats on a county governing board (see 156 So. 2d 825 (Miss. Sup. Ct.)). This Court dismissed the appeal for want of jurisdiction and also denied certiorari. The State Supreme Court had indicated that Mississippi law required districting of county boards on a population basis, that an adequate remedy at law existed to compel redistricting, and that redistricting would in fact be accomplished once the county's population had stabilized (a NASA facility was in the process of being located in the county involved). While under *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737, the availability of a political remedy is no justification for continued malapportionment, in the unique circumstances of the *Glass* case this Court's summary disposition can hardly be given great significance. Some two years later, in *Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss), a federal court in Mississippi ordered redistricting of Hancock County's Board of Supervisors on a population basis, undeterred by this Court's previous action.

Finally, in *Griffing v. Bianchi*, 382 U.S. 15, the Court dismissed "for want of jurisdiction" an appeal cause the challenge to the districting was collateral in nature. And several have determined that the substantive standards of *Reynolds v. Sims* are inapplicable at the local level of government. See the discussion *infra*, pp. 50-59.

from a decision holding that the Equal Protection Clause applied to apportionment of local governmental bodies, but that the district court would stay its hand pending resort to the political process for correction of the existing malapportionment (238 F. Supp. 997 (E.D.N.Y.)). Dismissal for want of jurisdiction is plainly explicable on the ground that the appeal there taken was not from a final order. Indeed, had this Court disagreed substantively with the district court's holding, such a dismissal would be more difficult to explain."

G. THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN REYNOLDS AND RELATED CASES ENCOMPASS LOCAL GOVERNMENTAL BODIES AS WELL AS STATE LEGISLATURES

As a matter of consistent and logical constitutional interpretation, the proposition that the equal-population principle of *Reynolds* applies to elected bodies of local government seems virtually self-evident. It would seem rather strange if a State's legislature were required to be apportioned on a population basis under the Equal Protection Clause, but its political subdivisions, exercising delegated State powers, were not subject to a similar constitutional requirement. Indeed, much of the language of the Court in its opinion in *Reynolds*, in articulating the basic constitutional principles, is fully applicable to units of local government. So, also, the fundamental principles shaped and enunciated in *Reynolds*' two pre-

"*Griffing v. Bianchi*, at a somewhat later stage, is of course before the Court presently as one of the instant cases, No. 491, and the Court's noting of probable jurisdiction seems to undermine whatever significance might be attributed to its earlier dismissal.

cursors, *Gray v. Sanders*, 372 U.S. 368, and *Wesberry v. Sanders*, 376 U.S. 1, are likewise relevant. In this triumvirate of constitutional decisions implementing substantively the adjudicatory framework grounded on *Baker v. Carr*, the Court spoke in broad terms of the right to vote and the nature of representative government.

In *Gray v. Sanders*, the Court, holding the Georgia county-unit system invalid, stated that "[t]he idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions" (372 U.S. at 380). In addition, it stated that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State" (*ibid.*). In *Reynolds* the Court characterized *Gray* as having "established the basic principle of equality among voters within a State," and as having "held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections" (377 U.S. at 560).

In *Wesberry v. Sanders*, the Court held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" (376 U.S. at 7-8). In reaching that result the Court stated that "[t]o say that a vote is worth more in one district than in another would * * * run counter to our fundamental ideas of democratic government" (*ibid.*). And, in language of no less applicability to the instant cases than to congressional districting, the Court added (*id.* at 17):

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

In *Reynolds* the Court referred to *Wesberry* as having "clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State" (377 U.S. at 560-561). This "fundamental principle" is just as applicable to the local level of government, in our view, as to the State and national levels.

The actual holding in *Reynolds v. Sims* was that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis" (377 U.S. at 568). But the Court's opinion expresses the basic constitutional concepts in such a way as plainly to encompass apportionment, representation and the right to vote at the local, as well as the State, level of government. Early in its *Reynolds* opinion the Court struck the note it was to follow consistently throughout (377 U.S. at 555):

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a

debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Restrictions on the right to vote, resulting from unfair districting schemes, "strike at the heart of representative government" at the local level no less than in the election of State legislators. Just as in the State legislative apportionment cases, "the rights allegedly impaired are individual and personal in nature" (*id.* at 561), and here, too, "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights * * *" (*id.* at 562). Again, in language bearing directly on the malapportionment of bodies of local government whose members are elected from districts, the Court in *Reynolds* pointed out (*id.* at 563):

Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. * * *

Government at the local level, through the medium of bodies whose members are elected by the people, is no less representative government than that involving State legislatures. As the Court in *Reynolds* stated (*id.* at 565):

But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes

of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. * * *

In our view, the full and effective participation of millions of Americans in representative government at the local level requires that they have an equally effective voice in the election of the members of local bodies. Like State legislatures, local governmental bodies "are responsible for enacting laws by which all citizens are to be governed," and should therefore "be bodies which are collectively responsive to the popular will" (*ibid.*). In regard to representation both at the local level and at the State level, "all voters, as citizens of a State, stand in the same relation regardless of where they live," and are thus entitled to "uniform treatment" insofar as apportionment and districting are concerned (*ibid.*). "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment" whether representation in a State legislature or in a local governmental body is involved (*id.* at 566).

Under the Court's formulation in *Reynolds*, "the basic principle of representative government" is that "the weight of a citizen's vote cannot be made to depend on where he lives" (*id.* at 567). This constitutional precept is, in our view, directly applicable to bodies of local government elected from districts,

and requires that those districts, like State legislative districts, be substantially equal in population. A contrary holding would not only result in a serious limiting of *Reynolds* and other voting rights cases but would run completely counter to the broad language and reasoning of the Court in that case. Continued malapportionment on the local level of government constitutes, we believe, an indefensible infringement of basic constitutional rights. In a sense, these cases involve the final step in the constitutional evolution that began with *Baker v. Carr*.¹⁴ That this is actually a small step, and an almost unavoidable one, seems clear from a consideration of the constitutional principles laid down by the Court in *Reynolds*.¹⁵

¹⁴ In his dissenting opinion in *Fortson v. Morris*, 385 U.S. 231, 242, Mr. Justice Fortas included a discussion of what he appropriately described as "the basic instrument of democracy—the vote," stating that this Court's apportionment and voting rights decisions "have reinvigorated our national political life at its roots so that it may continue its growth to realization of the full stature of our constitutional ideal" (385 U.S. at 249). Pointing out that "[i]t is the function—the office—the effect given to the vote, that is protected," he noted, in language no less applicable to local elections: "A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court" (id. at 250).

¹⁵ A suggestion is sometimes made that certain language in the *Reynolds* opinion indicates a view on the part of the Court that the constitutional principles enunciated in that case are inapplicable to units of government subordinate to the State level. In the course of discussing and rejecting the so-called federal analogy, the Court stated (377 U.S. at 575): "Political

Several of the Court's post-*Reynolds* decisions involving voting rights also contain language of no little subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." Thereafter, the Court included a quote from *Hunter v. City of Pittsburgh*, 207 U.S. 161, 173, relating to the broad powers of a State over local governmental units. Any reliance of this language for the proposition that the equal-population principle of *Reynolds* is inapplicable at the local level of government is, we submit, wholly misplaced. That language was directed solely to the question of whether local units of government bear the same relationship to State government as the States do to the federal government. The obvious conclusion was that they do not, and this provided one of the reasons for the Court's rejecting an argument that an analogy to the federal Congress could be relied upon as justification for apportionment of seats in one of the two houses of a bicameral legislature on a basis other than population. Not only the context of this language but also the concluding sentence of the paragraph in which it appears make its limited scope quite clear; the Court concluded the particular discussion by stating that "[t]he relationship of the States to the Federal Government could hardly be less analogous" (*ibid.*).

Insofar as the broad language of the *Hunter* case is concerned, any thought that *Hunter* could be relied upon for the proposition that constitutional principles are generally inapplicable to local units of government because of their dependence on the States for their very existence is plainly refuted by this Court's reading of *Hunter* in *Gonzillion v. Lightfoot*, 364 U.S. 339. While recognizing "the breadth and importance" of a State's power "to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units" (364 U.S. at 342), the Court concluded, as to the limited meaning of *Hunter*, that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases" (*id.* at 344).

pertinence to the applicability of the equal-population principle of *Reynolds* to local governmental bodies." In *South Carolina v. Katzenbach*, 383 U.S. 301, 337, which upheld the constitutionality of the Voting Rights Act of 1965, the Court stated, in regard to the participation of Negroes in the political process as newly enfranchised voters: "Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live." That the bright promise of that legislation might be effectively frustrated, at least in part, through malapportionment of local governmental bodies seems too plain to question. As we develop more fully later (*infra*, pp. 70-72), this consideration provides an added reason for holding *Reynolds* applicable to the local level of government.

It is of course irrelevant, though literally true, that there is no federal right to vote in local elections, in the sense that the federal Constitution does not require popular election, or election by districts, of members of local governmental bodies. Once a de-

"Nothing in the Court's decision in *Fortson v. Morris*, 385 U.S. 231, indicates, in our view, a retreat from *Reynolds*, at least insofar as its application to local governmental bodies is concerned. *Fortson* simply held the Equal Protection Clause, as construed in *Gray v. Sanders*, did not prohibit Georgia from having its legislature select its Governor from those two candidates receiving the most votes in a general election, where neither received the majority required under State law. In finding the challenged procedure constitutionally permissible, the Court concluded that nothing in the federal Constitution dictated "the method a State must use to select its Governor" (*id.* at 234). *Fortson* has no application where a State has established a system of election by districts to determine the composition of a governmental body.

termination is made that an elective system will be used, however, districting must be on a population basis. As this Court said in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665, holding Virginia's poll tax unconstitutional: "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Certainly a State can constitutionally provide that members of local governmental bodies are to be elected at large rather than by districts," or shall be appointed rather than elected, so long as the appointment process is not a discriminatory one. Indeed, for that reason, the principle announced in *Reynolds* is simply inapplicable to many units of local government.* But where a State establishes and maintains a local governmental unit which can fairly be said to be intended to be representative in nature, where the State determines that such a body is to be comprised, in whole or in part, of members elected by the people, and where the State utilizes a system of election by dis-

* Except where a requirement of residence districts of unequal population is superimposed upon such an at-large election scheme. See *Fortson v. Dorsey*, 379 U.S. 433, 437-439, 441, and *Burns v. Richardson*, 384 U.S. 73, 88; see also the discussion *infra*, pp. 86-92.

* As discussed *infra* (pp. 109-110), the present structure of local governmental bodies is such that probably fewer than one quarter of the units presently in existence are so organized so as to fall within the category of bodies to which, in our view, the equal-population principle of *Reynolds* might be applied.

tricts for determining the members of such a body," the equal-population principle, we submit controls. In that situation, the Equal Protection Clause requires that such districts be substantially equal in population, thus assuring the right to cast a properly weighted vote in local elections.

Narrowly construed, *Reynolds v. Sims* is a State legislative case, while the bodies whose apportionment is here at issue do not function statewide. But no differences in the nature of the governmental entities, nor in the elective process by which their members are determined, suggest that a contrary result should be reached in the instant cases. Where the State has given its citizens the right to express their collective will in designating the membership of a governmental body, it may not, consistent with *Reynolds'* construction of the Equal Protection Clause, classify them on any basis other than population. Those few courts which have found *Reynolds* inapplicable to local bodies and the defendants below in the instant cases have consistently sought to distinguish *Reynolds* on the facile ground that the governmental units involved were not State legislatures." Such a distinction lies at the heart of virtually every argument which can be made against applying *Reynolds*

"By a "system of election by districts" we mean an arrangement under which members of local bodies are elected either directly or indirectly by those residing in various prescribed areas, or, although elected at large, have primary affiliations with a particular segment of the electorate. See the discussion *infra*, pp. 86-92, 96-99.

"See the cases ~~discussed~~ in notes 46 and 56, *infra*.

to the local level of government." It is a distinction, we submit, having no constitutional significance in relation to the question here involved. The constitutional rule enunciated in *Reynolds* did not derive from factors inherent in or peculiar to State

"Among the arguments raised against applying *Reynolds* to local governments are suggestions that control over local elections is reserved to the States under the Tenth Amendment and is a matter within the "plenary power" of the States. Both suggestions are merely variations of the argument that the United States Constitution neither grants nor guarantees the right to vote in local elections. Although this is a truism the proposition that States may therefore confer the right of suffrage in an unequal manner is, because of the Fourteenth Amendment, a *non-sequitur*. The Tenth Amendment is simply declaratory of the relationship existing between the State and federal governments, and does not allow a State to exercise its reserved powers however it sees fit, in violation of personal and individual rights protected by the Fourteenth Amendment—indeed, that Amendment reserves powers not only to the States but also "to the people." And use of the term "plenary power" substitutes rhetoric for analysis and simply adds confusion. Plenary is not a synonym for absolute and the Fourteenth Amendment places qualifications and limitations on the scope of State authority. Although the State has the option of providing for elected or appointed local governmental bodies, it is without discretion to distribute the right to vote unequally among its electorate. And it is of no constitutional consequence that provisions of the State constitutions were involved in *Reynolds* and the accompanying cases, whereas State or local statutes are involved in these four cases—except to the extent that remedies can more easily be fashioned when complex constitutional amendment procedures need not be invoked. The impairment of the right to vote is just as acute whether the apportionment is accomplished by the State's constitution or by its statutes or by local laws.

It is also argued that *Reynolds* is distinguishable because States have "sovereignty"—having retained all which was not relinquished to the federal government—while local units are mere political subdivisions, created by the State and exercising

legislatures. In *Baker v. Carr*, the Court expressly rejected the argument that apportionment questions were constitutionally cognizable under the Guaranty Clause (369 U.S. at 218-226, 228-229). Rather, under and since *Baker*, it has been the Equal Protection Clause which has provided the constitutional touchstone for assaying the fairness of the relationship between the composition of a governmental body and the individual voter. No significant difference exists, in our view, between the elective process at the State, as distinguished from the local, level.⁴⁴ At whatever level, such a system of election contemplates representation of the applicable constituency in the body being elected. It is the right to vote for mem-

delegated authority. But again the distinction is without constitutional relevance to the issue presented here. Sovereignty is an elusive concept, at best, and can be exercised only by agents of the State. It cannot be that the State legislature exercises sovereignty when it apportions itself but not when it apportions local governmental bodies or delegates that task to the local units. In each instance, it is the State which acts and such action is similarly subject to scrutiny under the Equal Protection Clause, which says nothing about sovereignty.

⁴⁴ That the States are sovereign entities, and that they exercise inherent and not delegated powers, under the Tenth Amendment, were not relevant considerations insofar as the conclusions reached by the Court in *Baker* and *Reynolds* are concerned (see 377 U.S. at 564, 574). Arguments that local governmental bodies are outside the equal-population principle of *Reynolds* since they are not sovereign (some constitutional home-rule municipalities do have incidents of sovereignty, however) and exercise delegated powers as creatures of the States are thus, in our view, inapposite in regard to whether the Equal Protection Clause requires the election of the members of such bodies from equally populated districts, when an election-by-district scheme is established under State law.

bers of a representative body which is given Fourteenth Amendment protection in *Reynolds*. If the Equal Protection Clause requires that State legislators be elected from equally populated districts, it requires, by the same token, that members of local bodies be elected on a similar basis.

D. THE TREND OF AUTHORITY IN THE STATE AND LOWER FEDERAL COURTS OVERWHELMINGLY SUPPORTS APPLICATION OF THE REYNOLDS' EQUAL-POPULATION PRINCIPLE TO LOCAL GOVERNMENTAL BODIES

Litigation challenging the apportionment of local governmental bodies has, in the wake of *Baker* and *Reynolds*, reached substantial proportions. Significantly, the conclusion reached by an overwhelming number of courts which have considered the matter is that the equal-population principle of *Reynolds* applies no less at the local than at the State level of government. At least seven State courts of last resort which have considered the question have reached that conclusion,⁴ and provide convincing support for

"As an aftermath of *Reynolds* and the companion cases, cases involving challenges to the distribution of voting strength for the election of members of local governmental bodies have been decided in more than 30 State and federal jurisdictions. A predominant number of these cases have involved county governing boards, a lesser number city councils, still fewer county school boards, and several other sorts of local bodies (see the discussion, *infra*, pp. 49-51).

"California, New York, Wisconsin, Minnesota, Maryland, Missouri and South Dakota, in the following decisions: *Miller v. Board of Supervisors*, 405 P. 2d 857 (Calif. Sup. Ct.); *Seaman v. Fedourich*, 209 N.E. 2d 778 (N.Y. Ct. App.); *State ex rel. Sonneborn v. Sylvestor*, 182 N.W. 2d 249 (Wis. Sup. Ct.); *Hanlon v. Towey*, 142 N.W. 2d 741 (Minn. Sup. Ct.); *Montgomery County Council v. Garrett*, 222 A. 2d 164

the position here taken. Both the tide of decision and the analysis and reasoning which have led the State courts in this direction argue persuasively, we submit, that this Court should approve and endorse the efforts being made to give vitality and consistent application to the principles enunciated in *Reynolds*."

(Md. Sup. Ct.); *Armentrout v. Schooler*, 409 S.W. 2d 138 (Mo. Sup. Ct.); *Bailey v. Jones*, 139 N.W. 2d 385 (S. Dak. Sup. Ct.).

Insofar as we can determine, only two State courts of last resort have reached an inconsistent result. In *Brouner v. Bronkema*, 141 N.W. 2d 98, and *Knudsen v. Klovering*, 141 N.W. 2d 120, the Michigan Supreme Court divided evenly, the effect of which was to uphold the challenged arrangements against constitutional attack (see 141 N.W. 2d at 123). And in *Avery v. Midland County*, 406 S.W. 2d 422, pending on petition for certiorari, No. 958, this Term, the Texas Supreme Court held *Reynolds* inapplicable in a case involving a county governing board apportioned on a basis grossly disproportionate to population, although finding the existing districting arbitrary and irrational on State law grounds. In *People v. O'Neill*, 210 N.E. 2d 526, the Supreme Court of Illinois held that the apportionment of a county governing board could not be collaterally attacked by asserting its alleged malapportionment in defense of an action to recover unpaid taxes, relying on the *de facto* doctrine and without reaching the question of the application of the equal-population principle at the local level. Similarly, in *Davis v. Dusch*, 139 S.E. 2d 25, at an earlier stage of the litigation involved in one of the instant cases, No. 724, the Virginia Supreme Court of Appeals denied mandamus seeking to compel reapportionment of city council seats, on State law grounds and without reaching or discussing any federal constitutional questions.

"Several courts have, however, determined to await direction from this Court as to whether *Reynolds*' equal-population principle applies at the local level of government. Included in that group are the lower federal courts in two of the instant cases, Nos. 480 and 624, both splitting two-to-one on that question, and the Michigan Supreme Court in the cases cited in note 46, *supra* (see 141 N.W. 2d at 107, 119-120, 121-123). See the discussion in note 54, *infra*.

A notable example is the decision of the New York Court of Appeals in *Seaman v. Fedourich*, 209 N.E. 2d 778.⁴⁴ In that case, involving a challenge to the districting for election of members of the Binghamton Common Council, the court stated (209 N.E. 2d at 782) that "[t]here can be little doubt . . . that [the 'one person, one vote'] principle is applicable to elective legislative bodies exercising general governmental powers at the municipal level" It reasoned (*ibid.*):

It is axiomatic that local governmental units are creations of, and exercise only those powers delegated to them by, the State . . . and, cer-
 "Local government in New York has been undergoing a veritable revolution, insofar as the correction of existing malapportionment is concerned, in the wake of *Reynolds*, spurred on by the Court of Appeals' decision in the *Seaman* case. Most of the litigation has involved county boards of supervisors, but city councils have been concerned also in some of the cases. State court decisions on local government apportionment in New York include: *Goldstein v. Rockefeller*, 257 N.Y.S. 2d 994 (Sup. Ct., Monroe Co.); *Augustini v. Lasky*, 262 N.Y.S. 2d 594 (Sup. Ct., Broome Co.); *Barislay v. Board of Supervisors*, 263 N.Y.S. 2d 854 (Sup. Ct., Onondaga Co.); *Treiber v. Lanigan*, 264 N.Y.S. 2d 797 (Sup. Ct., Oneida Co.); *Dona v. Board of Supervisors*, 266 N.Y.S. 2d 229 (Sup. Ct., St. Lawrence Co.); *Town of Greenburgh v. Board of Supervisors*, 266 N.Y.S. 2d 998 (Sup. Ct., Westchester Co.); *Shilbury v. Board of Supervisors*, 260 N.Y.S. 2d 981 (Sup. Ct., Sullivan Co.), affirmed *per curiam*, 267 N.Y.S. 2d 1022 (App. Div.); *Davis v. Board of Supervisors*, 273 N.Y.S. 2d 183 (Sup. Ct., Clinton Co.); *Graham v. Board of Supervisors*, 267 N.Y.S. 2d 583 (Sup. Ct., Erie Co.), affirmed, 273 N.Y.S. 2d 419 (Cl. App.); *Morris v. Board of Supervisors*, 273 N.Y.S. 2d 433 (Sup. Ct., Herkimer Co.). Several lower federal court decisions involving subordinate New York units of government are discussed *infra*, pp. 53-54. See also *Lodico v. Board of Supervisors*, 256 F. Supp. 442 (S.D.N.Y.).

tainly, if the latter may exercise its legislative powers only in a body constituted on a population basis, any general elective municipal organ to which it delegates certain of its powers must, by a parity of reasoning, be subjected to the same constitutional requirement. Viewed in another way, if, as seems evident, the thrust of the Supreme Court's decisions is that it is inherent within the concept of "equal protection" that a person has a substantial right to be heard and to participate, through his elected representatives, in the business of government on an equal basis with all other individuals, no reason or justification exists for differentiating, so far as that right is concerned, between the general governmental business carried on in the highest legislative organs of the State and that conducted, by virtue of a delegation of authority, in municipal law-making bodies."

Also worth noting is the statement of the Attorney General of New York, set out in *Goldstein v. Rockefeller*, 257 N.Y.S. 2d 994, 1000-1001 (N.Y. Sup. Ct., Monroe Co.), that "the trials, inconvenience and evil of upheaval due to the application of the * * * [equal-population principle] are less to be feared, if

"See also the lower court opinion in *Seaman*, stating (258 N.Y.S. 2d 152, 155): "That the 'one person, one vote' principle is applicable to the apportionment of elected members of legislative bodies of governmental units below the level of state legislatures can no longer be doubted"; and see *Shilbury v. Board of Supervisors*, 260 N.Y.S. 2d 931, 935 (Sup. Ct., Sullivan Co.), referring to "a recent avalanche of judicial opinion definitely indicating [the] constitutional invalidity" of a local government apportionment scheme not based on population, and *Morris v. Board of Supervisors*, 273 N.Y.S. 2d 453, 455 (Sup. Ct., Herkimer Co.).

met with intelligence, cooperation and good will, than the evil of a constantly increasing and more acute imbalance of representation of citizens in their local legislative bodies due to the failure to apply the proposition."

California, our most populous State, has joined New York, the second largest, in applying *Reynolds* to local governmental bodies. In *Miller v. Board of Supervisors*, 405 P. 2d 857, 860, the California Supreme Court stated: "Although we are not here dealing with voting apportionment at the level of the state legislature, * * * no reason appears why equal protection assures representative voting to the electors of the State of California as a whole but not of the County of Santa Clara." Subsequently, in *Wiltsie v. Board of Supervisors*, 419 P. 2d 440,⁴⁴¹ that court, in another county board apportionment case, noted that its holding in *Miller* was grounded not only on a State statutory provision, but "more particularly on the constitutional mandate of the equal protection clause * * *."

One of the earlier State court decisions holding the equal-population principle applicable to local governmental bodies is that of the Wisconsin Supreme Court in *State ex rel. Sonneborn v. Sylvester*, 132 N.W. 2d 249. In the face of various arguments for inapplicability, that court stated that "[t]he right to vote whether statutory or constitutional to mean anything

"Several earlier California Supreme Court decisions in county board apportionment cases were grounded on State not federal law. See *Griffa v. Board of Supervisors*, 334 P. 2d 491, 388 P. 2d 888; *Henderson v. Superior Court of Marin County*, 390 P. 2d 208.

in a representative government means the right to secure equal representation," and that "county boards possessing the type of legislative power which they do must be considered a unit of government which should be equally representative of the people of the county" (132 N.W. 2d at 255). That county boards are statutory creatures of the legislature, the Wisconsin court continued, is "not determinative of whether the 14th Amendment applies to their composition when the members of a county board are determined by the elective process" (*ibid.*).² It concluded (*id.* at 255, 256):

Since the basic principle of representative government is that the weight of a citizen's vote cannot be made to depend on where he lives, then county boards as units of representative government should not be constitutionally inimical from the requirements of the 14th Amendment. * * *

* * * Since the composition of the legislature must conform to the principle of equal representation, it is logical that the arm or political subdivision of such legislature enacting legislation should be governed by the same principle of equal representation.

In *Bailey v. Jones*, 139 N.W. 2d 385, the South Dakota Supreme Court, after considering *Baker* and

²In the course of its opinion the Wisconsin court posed this question (132 N.W. 2d at 256): "Can it be successfully argued today that the legislature could provide for the election of supervisors of the county board on the basis of race, creed, or color? We think not. Nor do we believe that an increase or dilution of the weight of votes on the basis of political subdivisions or of the character of the area in which people live can be justified by the plenary-power argument."

Reynolds and discussing the functions and powers of county governing boards in that State, concluded (139 N.W. 2d at 388):

Boards of County Commissioners are representative of the people and by parity of reasoning the concepts of equal protection as delineated by, and in conformity with, the decisions of the United States Supreme Court applies to them.

Likewise, in concluding that the Equal Protection Clause requires districts for the election of members of county governing boards to be equal in population, the Minnesota Supreme Court stated, in *Hanlon v. Towey*, 142 N.W. 2d 741, 745:

Despite the absence of any specific constitutional provision requiring apportionment of state legislative districts on an equal-population basis, these decisions [*Baker*, *Gray*, and *Reynolds*] make it unmistakably clear that the site of a citizen's home—like race, creed, or color, and most recently, affluence—does not afford a permissible basis for distinguishing between qualified voters within the state. While it is true that no decision of the United States Supreme Court has yet applied the equal protection principle to "local legislative bodies in a state," there is every indication that the right to vote for representatives upon a county board as presently constituted in our state does have constitutional significance. The language of the decisions affords appellants little comfort and indeed no discernible support for their claim that the legislative power over apportionment of voters vested with the electoral control

of county government is absolute, untrammelled by constitutional restraint.

While noting that the legislature could withdraw county government from electoral control and provide for the appointment of local officials, the Minnesota court observed that "so long as the present system of a representative form of government is maintained, the fundamental nature of the right to vote inescapably requires the application of fundamental principles" (*id.* at 746).

Two rather recent decisions of the Maryland Court of Appeals—*Montgomery County Council v. Garrett*, 222 A. 2d 164, and *Gray v. Board of Supervisors of Elections of Baltimore County*, 222 A. 2d 176—held the equal-population principle of *Reynolds* applicable to local governmental bodies. In its opinion in the *Montgomery County Council* case, the Maryland court concluded (222 A. 2d at 166): "There remains little doubt that the one man, one vote principle, so fully articulated in *Reynolds v. Sims*, * * * is now applicable to political subdivisions of a state."

Finally, in *Armentrout v. Schooler*, 409 S.W. 2d 188, the Missouri Supreme Court, observing that the city Council involved in that litigation exercised general governmental powers, stated (*id.* at 143):

The fact that cities are created by the legislature, do not derive their power from the people affected, and occupy a subordinate position in the hierarchy of government does not detract from the principle that in a representative government the people are entitled to equal representation. As a matter of logic voters selecting their representatives to sit on a municipal leg-

islative body are entitled to the same equal protection in the exercise of their right of suffrage as that enjoyed by voters on the state level selecting their state senators and representatives in the state and national legislative bodies; are entitled to full and equal voice in the choice of their representatives on the city council without dilution or diminution of the weight of their individual votes because of the ward in which they happen to reside."

"Mention should also be made of several lower court decisions which contain a discussion of the question of the applicability of the equal-population principle to local governmental bodies. In *Brouwer v. Bronkema*, 13 Court Decisions on Legislative Apportionment (National Municipal League) (hereinafter "C.D.L.A.") 81 (Kent Co., Mich. Cir. Ct.), subsequently reviewed and reversed by an evenly divided Michigan Supreme Court (141 N.W. 2d 98, 123; see note 46, *supra*), a careful articulation of the constitutional principles is set forth. In that opinion, in what appears to be the first local government case to reach judgment after this Court's decision in *Reynolds*, the Circuit Court found "persuasive" the argument that the Equal Protection Clause requires that county board seats must be apportioned on a population basis. In support of this conclusion, several analytical steps were relied upon (13 C.D.L.A. at 95): 1) "The Fourteenth Amendment applies to the State and to every governmental agency or instrumentality of the State which exercises powers delegated to it by the State"; 2) "The County is a governmental instrumentality or division of the State and the board of supervisors is the legislative body of the County. That board exercises legislative powers delegated to it by the State"; and 3) "The State may exercise its legislative powers only in a legislative body apportioned on a population basis and if it delegates a part of those powers, it must do so to a legislative body apportioned to the same basic constitutional standard." Repeated reference has been made to this reasoning by other courts considering the question. The remaining part of the circuit court's lengthy opinion involves a detailed consideration and refutation of various contrary arguments made against the applicability of the equal-population

Lower federal as well as State courts have been involved in local government apportionment controversies during the past few years, and the trend of decision in those courts has been the same. Several of these federal court decisions, apart from those in the instant cases, are worth noting in regard to the analysis utilized in concluding that the equal-population principle applies at the local level of government. In *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945 (D. Md.), decided several months after this Court's decision in *Reynolds*, the district court assumed the applicability of the equal-population principle to local governmental bodies, and stated (234 F.

principle to local bodies. In concluding, that court stated (13 C.D.L.A. at 112): "It is the 'supreme law of the land' that each 'person' have equal representation in the legislative body in which the legislative power of the State is exercised and such right requires that the membership of such body be apportioned on a population basis. A part of the legislative power of the State is delegated to and exercised by County Boards of Supervisors. That Board, like its parent body, the State Legislature, must be apportioned on a population basis if all persons in the County are to have equal representation therein."

Similarly, the decision of the Superior Court of New Jersey, Chancery Division, in *Malk v. Hoffman*, 209 A. 2d 150, should be mentioned. Holding that the equal-population principle applies to county governing boards, and that the boards of three counties there at issue were "clearly malapportioned," that court stated that "[i]t could not seriously be contended otherwise," and continued (209 A. 2d at 152): "Since the basic principle of representative government, as stated in the *Reynolds* case, . . . is that the weight of a citizen's vote cannot depend on where he lives, the composition of the boards of freeholders should comply with the Fourteenth Amendment. A county is generally considered a political subdivision or agency of the State. . . . If the State Legislature must conform to the principle of equal protection, it is logical that the 'county legislature' should conform to the same principle."

Supp. at 950): "Manifestly, plaintiff's right to equal protection of the laws in his representation in the City Council is being presently denied * * *." In affirming that decision, the Fourth Circuit Court of Appeals, the only federal appellate court to pass directly on the question of the applicability of *Reynolds* to local government apportionment," stated that the relevance of the Equal Protection Clause to districting for city council seats "could not successfully be * * * contested in this appeal, for the 'one man, one vote' principle * * * logically applies to councilmanic no less than to statewide apportionment" (352 F. 2d 123, 124).

In *Delozier v. Tyrone Area School Board*, 247 F. Supp. 30, 34-35 (W.D. Pa.), the court explained its

"In *Lynch v. Torquato*, 343 F. 2d 370, the Third Circuit found the equal-population principle inapplicable to a political party's local committee organization, a matter discussed in note 110, *infra*. But see 343 F. 2d at 372, where that court stated: "But the citizen's constitutional right to equality as an elector, as declared in the relevant Supreme Court decisions, applies to the choice of those who shall be his elected representatives in the conduct of government * * *." Also, in *Simon v. Landry*, 359 F. 2d 67, the Fifth Circuit reversed and remanded a district court decision not to convene a three-judge court in a local government apportionment case (see *Simon v. Lafayette Parish Police Jury*, 226 F. Supp. 301 (W.D. La.)), without reaching the constitutional questions involved (359 F. 2d at 68), and certiorari was denied by this Court, 385 U.S. 838. *Simon* is discussed further in notes 56 and 131, *infra*. Of course, in one of the instant cases, No. 724, the Fourth Circuit, following its holding in the *Ellis* case, again applied the equal-population principle to a local governmental body, there the Virginia Beach City Council (see the discussion *infra*, pp. 84-92).

reasons for applying the equal-population principle to the election of school boards:

Nor do we believe that the status of a local school district, being an arm or agency of the state legislature to administer its educational system makes it immune from the constitutional requirement. Admittedly the state legislature could administer its school system other than by local elective boards. * * *

[But] [t]he legislature of the State of Pennsylvania has delegated the management of its educational system in local areas to local school boards. These boards, in the class of school district in the present case, and in most other classes, are elected by popular vote. The state has also delegated to such boards the power to levy taxes, and in most local communities the various taxes levied by the school boards are the largest local tax imposition. While school boards are subject to numerous limitations in the exercise of local powers, these limitations are no less in scope or variety than the limitations imposed on other governmental subdivisions or municipal corporations. * * *

In the sequel to the earlier *Glass* case (see *supra*, p. 28), *Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss.), the court concluded that "plaintiffs are entitled to have this court require that the shocking disparity of population among the supervisors' districts of Hancock County be corrected" (*id.* at 616), and stated that "[i]t is a sad commentary on local political leadership that this situation, which we find to be invidious discrimination within the meaning of *Baker v. Carr* and its progeny, must now be

dealt with by a federal court rather than by the people and officials of Hancock County, Mississippi" (*id.* at 614-615). Similarly, in federal court case involving a Mississippi county governing board, Judge Mize, in an unreported decision (*Damon v. Lauderdale County Election Comm'rs*, 13 C.D.L.A. 140 (S.D. Miss.)), concluded that "the Fourteenth Amendment is applicable to redistricting counties as well as the legislatures of the various states," relying extensively on the earlier Michigan circuit court decision and opinion (discussed in note 52, *supra*).

In *McMillan v. Wagner*, 21 C.D.L.A. 102, 109 (S.D.N.Y.), the court stated:

We conclude that the Fourteenth Amendment allows no distinction between a New York State resident's right to be equally represented in the State Legislature, and a New York City resident's right to be equally represented on the Board of Estimate. Both residents are given by New York law the right to vote for representatives to a body possessing state governmental powers. When this governmental body meets, the Fourteenth Amendment requires that each citizen be afforded equal representation.

And in *Blaikie v. Wagner*, 258 F. Supp. 364 (S.D.N.Y.), although upholding the districting for seats in the New York City Council despite some departures from population-based representation, the district court nevertheless stated (258 F. Supp. at

367):

Although there were decisions of the Supreme Court which would have supported a contrary result and although persuasive arguments can

be made to the effect that government at such levels should be by the people and not by the judiciary, the decisions of various courts, State and Federal, so overwhelmingly point to the [equal-population] principle's application at County and City levels that in *Bianchi* this particular Rubicon was crossed. Furthermore, logic, for whatever merit it may have in this situation, is persuasive against a re-crossing. Concededly, the City Council is the legislative body enacting laws affecting the lives of over eight million people—a population far greater than that of many States.

Finally, in *Strickland v. Burns*, 256 F. Supp. 824 (M.D. Tenn.), a county school board apportionment case like *Delozier* (discussed *supra*, pp. 51-52), the district court rejected the argument that the Equal Protection Clause "does not require that local representative government, or at least a local representative governmental body which is primarily administrative rather than legislative in character, conform to the 'one man, one vote' standard of *Reynolds v. Sims* * * *," (*id.* at 825), and stated (*id.* at 826):

In *Reynolds* and the related cases, the Supreme Court held that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people and that any system of apportionment by which the weight of a citizen's vote is diluted when compared with the votes of citizens living in other areas is violative of rights secured by the Equal Protection Clause. *Reynolds* was decided in the context of state legislative apportionment and * * * the Court emphasized the fact that state legislatures are, historically, the

fountainhead of representative government in this country. Nevertheless, the rationale of the *Reynolds* decision, that is, that it constitutes invidious discrimination to dilute the efficacy of votes because of the residence of the voters, is logically as applicable to the backwaters of representative government at the local level as to the fountainhead of representative government at the state level.

Concluding, the court stated (*id.* at 827):

* * * [W]e can find no basis for applying the "one man, one vote" rule to the congeries of powers possessed by the Legislature itself and at the same time denying its application to a subordinate body simply because it possesses a fractional part of those powers, so long at least as the fractional part cannot be said to be insignificant or unimportant * * *.

Some of the opinions in the instant cases likewise elaborate the reasons for concluding that the equal-population principle of *Reynolds* applies at the local level of government. In the Suffolk County case, for instance, the court stated (R. 491; 134): "In county-wide administration, just as in state-wide administration, the inhabitants of the populous areas should not be governed by representatives drawn from other and thinly populated areas." It added (R. 491; 134):

It is not for this court to speculate about the type of representative government Suffolk County should have. Suffice it to say that the Board of Supervisors is constituted to serve as the legislative body for the County and, under the present undisputed population disparity, it is not representative of the voters

of the County as the Supreme Court has indicated is required of legislative bodies under the Equal Protection Clause.

Similarly, in the Virginia Beach City Council case, the Fourth Circuit concluded (R. 724; 119): "The principle of one-person-one-vote extends also to the level of representation, and exacts approximately equal representation of the people—that each legislator, State or municipal, represent a reasonably like number in population."

In the other two pending cases, Nos. 430 and 624, the three-judge courts split two-to-one on the question of the present applicability of the equal-population principle to local governmental bodies. In both instances the majority relied heavily upon the fact that this Court had not yet passed upon the issue." In

"In No. 430 the majority noted that "[t]he matter of malapportionment of boards and agencies of the states and their subsidiaries has not yet been before the United States Supreme Court" (R. 430; 220), and stated: "We recognize that the Supreme Court of the United States may at some time in the future reach the conclusion that the District Courts of the United States have the power and duty to prescribe guide lines for the selection of the many boards and commissions created and organized in connection with local government. We are satisfied that the Supreme Court of the United States has not yet reached that point. We are satisfied that we should not anticipate that the Supreme Court will reach that point" (R. 430; 221). Similarly, in No. 624 the majority stated (R. 624; 62): "It is not for us to forecast the likelihood that the Supreme Court will ultimately extend the principles of *Reynolds* * * * to the tens of thousands of subordinate political units of the states to which have been delegated some power to which the label 'legislative' may be attached. Some courts have essayed to do so, while others have been content to await the development of judicial standards in this comparatively uncharted area of constitutional law. A warning to make haste slowly may be read into refusal by the Supreme Court on two occasions to

both there were thoughtful and vigorous dissents developing the reasons supporting the applicability of *Reynolds* at the local level.

consider cases [citing *Glass* and *Tedesco*, discussed *supra*, pp. 28-23] involving the contention that the federal constitution requires local governmental bodies below the state level "apportioned on a population basis." On the other hand, it is fair to say that both of the panel majorities inclined toward the view that the equal-population principle of *Reynolds* should not be held applicable at the local level (see R. 430; 221; R. 624; 64).

"In No. 430, Judge Fox explained his views as follows (R. 430; 214-215):

"We are not here concerned with the nature or structure of governmental units as such. The relevance of "one man, one vote" to the present case is not an extension of the rule laid down by *Reynolds v. Sims* * * *, but, rather it is a precise application of *Reynolds* to its intended purpose—to secure a constitutionally protected right to individual citizens. Under the authority of *Reynolds* and other decisions of the United States Supreme Court * * *, I can see no warrant to arbitrarily cut off the citizens' right to fair representation at the county level.

"Since the majority opinion differs substantially as to the consequences of my conclusion, it may be well at this point to indicate exactly what is and what is not involved here. This is not a situation in which the legislature has appointed a commission or board—no one is contending for a right to vote for appointed officials. The legislature has not chosen to appoint Boards for each of the Intermediate School Districts in the State of Michigan, in which case the function of providing for public education would be delegated, but not, legislatively speaking, the responsibility. For in that situation, the legislature would have delegated the function of providing for public education, but the appointees would have been directly responsible to the legislature, an equally apportioned body directly responsible to all the people.

"But here the legislature has delegated not only the function, but also the responsibility, which would not be objectionable but for the gross malapportionment in the existing

A comprehensive review of the pertinent State and lower federal court decisions" thus indicates that the overwhelming weight of authority supports the view

system of selecting the Board. For under that system the members of the Board are not directly responsible to the legislature, but to the people by reason of the vote which the legislature has given them * * *. Since the vote is not given on a fairly apportioned basis, the responsibility is fractionalized, and the Board is, in effect, more responsible to the minority than to the majority.

In the Alabama county board case, Judge Johnson stated (R. 624; 65-66):

I think the conclusion is inescapable that the principles of *Reynolds v. Sims*—that is, the principles of equality among voters within a state and the fundamental precept that representative government is one of equal representation for an equal number of people without regard to race, sex, economic status, or place of residence—apply to these local organs of government. These boards of revenue perform important governmental functions, and are designed to be controlled by the voters over which they have jurisdiction. * * * [I]n discharging their duties, the boards are no less representative or reflective of the views of the citizens because they are smaller than the state unit. To the contrary, rather than limit the principles of *Reynolds*, as the majority opinion does, it would seem that these principles might well have their most meaningful application at the local level. Viewed another way, if, as seems evident, the thrust of the Supreme Court decisions is that it is inherent within the concept of "equal protection" that a person has a substantial right to be heard and to participate, through his elected representatives, in the business of government on an equal basis with all other individuals, no reason or justification exists for differentiating so far as that right is concerned, between governmental business carried on at the state level and that conducted on the local level.

Apart from the cases previously discussed, a few lower federal courts have concluded that the equal-population principle does not apply to local governmental bodies. See *John*

that the equal-population principle of *Reynolds* is applicable to local governmental bodies. And the analysis and reasoning engaged in by these courts convincingly demonstrate that this is the only logical and constitutionally sound conclusion, and that no meaningful distinction can be made, in terms of the requirements of the Equal Protection Clause, between the right to vote in State legislative and in local governmental elections.

E. A BREAK WITH REYNOLDS IN THE INSTANT CASES WOULD HAVE
UNFORTUNATE CONSEQUENCES

The results flowing from a determination that the equal-population principle of *Reynolds* does not apply to local governmental bodies would, in our view, be

son v. Genesee County, 232 F. Supp. 567 (E.D. Mich.), where, while the challenge to the county board apportionment was in the nature of a collateral attack, and could have been disposed of on that ground, the court went ahead and stated that, in its view, *Reynolds* was inapplicable at the local level of government (*id.* at 569-572); *Detroit Edison Co. v. East China Township School District No. 3*, 247 F. Supp. 296 (E.D. Mich.), similarly involving a collateral attack on the composition of a body of local government, where the court did not reach the specific constitutional question, but implied that, in its view, *Reynolds* should not be applied to local governmental bodies (*id.* at 300-301). See also *Simon v. Lafayette Parish Police Jury*, 228 F. Supp. 301 (W.D. La.), where the court, prior to this Court's decision in *Reynolds*, apparently concluded that the challenged districting scheme was not constitutionally defective. In reversing and remanding for the convening of a three-judge court, *sub nom. Simon v. Landry*, 359 F. 2d 67, 68, the Fifth Circuit noted that "[o]n a further hearing the district court determined that the equal protection one man-one vote principle of *Reynolds* . . . does not extend to subordinate governmental instrumentalities such as the Police Juries of Louisiana Parishes [county governing authorities]."

undesirable and unfortunate. A serious and lasting constitutional anomaly would be created: a citizen's vote could be diluted at the local level but not at the State level. A citizen would have a constitutionally protected right to population-based representation in his State legislature, but not in the organs of government which stand closest to him—his county board or city council or school board. Malapportionment at the local level of government would be perpetuated indefinitely." An opportunity to circumvent the full thrust of *Reynolds* would be given to State legislatures; they could delegate the exercise of significant

"Not unlike the malapportionment of many State legislatures (see *Reynolds*, 377 U.S. at 569-570), malapportionment of local governmental bodies goes far back into history in some instances. For example, in Hancock County, Mississippi, where the apportionment of the county governing board was challenged in the *Glass* and *Martinovich* cases, the last previous redistricting had occurred over 100 years earlier (see 156 So. 2d at 828), despite a State statute which required that counties be divided into five supervisors' districts "with due regard to equality of population * * *" (see 256 F. Supp. at 618, n. 1). And in the *Armentrout* case the court noted that the challenged districting for city council seats had "continued without change for more than 75 years" (409 S.W. 2d at 141).

Similarly, disparities from population-based representation at the local level are often greater than those existing, prior to *Reynolds* and its wake, in even the most malapportioned State legislatures. In one of the instant cases, for instance, a population-variance ratio of in excess of 100-to-1 existed between the most and the least populous districts electing members of the county governing board (R. 491; 126). And in the *Avery* case, No. 958, only five percent of the county's population resided in districts electing a majority of the members of the county governing board (see 406 S.W. 2d at 424). Other like examples of gross disparities from a population basis, too numerous to mention, are presented in many of the local government apportionment cases heretofore discussed.

powers to malapportioned local bodies (see Judge Fox's dissent in No. 430 (R. 430; 211-213), discussed in note 101, *infra*). The liberalizing promise of *Baker v. Carr* would not be permitted to reach full fruition. The ongoing reapportionment and redistricting at the local level taking place in many States would be cut short," and a return to the patterns of the past might be expected even in those States in which the applicability of *Reynolds* at the local level of government is already, in many respects, a *fait accompli*. The sound and logical, and in some respects bold, decisions of various States and lower federal courts, which have not hesitated or deferred decision to await a definitive holding by this Court, would be undermined and rendered nugatory. State courts of last resort" which have progressively sought to apply the equal-population principle of *Reynolds* in a logical manner to local governmental bodies would, in a very literal sense, be left holding the bag.

An acceptance of the view that *Reynolds* logically applies at the local level leads to the conclusion, we submit, that districts established for the election of members of local governmental bodies must be judged by the same substantive standards as are laid down for State legislative districts in *Reynolds*, i.e.,

"For a discussion of such an ongoing development, involving ward redistricting in Philadelphia, see Note, *Legal Problems of Ward Realignment in Philadelphia*, 38 Temple L.Q. 174 (1965).

"See, e.g., *State ex rel. Sonneborn v. Sylvester*, 132 N.W. 2d 249, 256 (Wis. Sup. Ct.); *Bailey v. Jones*, 139 N.W. 2d 335, 339 (S. Dak. Sup. Ct.); *Seaman v. Fedourich*, 200 N.E. 2d 778, 782 (N.Y. Ct. App.).

substantial equality of population. Some factual differences between the State and local bodies of course exist. On the local level virtually all bodies are unicameral in nature, while all but one of the 50 State legislatures is bicameral.** While the size of most local bodies is significantly smaller than most State legislative bodies, the constituencies on the local level would generally tend to be considerably smaller. A small numerical deviation from a population basis would thus tend to produce a larger percentage of disparity at the local than at the State level. And because the districts at the local level would tend to be considerably smaller than legislative districts in most States, both in terms of geography and population, more difficulty in following established political or natural or historical boundary lines might be presented in establishing equally populated, single-member districts at the local level. At all events, however, if the basic principle enunciated in *Reynolds*—that the weight of a person's vote cannot be made to depend on where he lives—applies to local governmental bodies, the same standard of equally populated districts would be a constitutional requisite. As under *Reynolds*, minor deviations to effectuate rational policy considerations would similarly be permissible.

Certainly there are a large number of these units of local government, and, in many respects, their nature, functions, powers and purposes differ (see the discussion, *supra*, pp. 16-21). As a logical starting point for constitutional analysis, however, we suggest

** This consideration, it would seem, would hardly run counter to the logic of applying *Reynolds* to local bodies, and might indeed tend to support such an application.

that the equal-population principle of *Reynolds* is applicable to all bodies of local government, representative in character, whose members are elected from districts (see *supra*, pp. 37-38). Subsequently, we discuss in more detail the particular bodies at issue in the instant cases (*infra*, pp. 72-101), in the context of a general consideration of the applicability of the basic constitutional principles to the various kinds of local governmental bodies. The conclusion as to the applicability of *Reynolds* could well rest solely on logic and consistent constitutional decision-making. In addition, however, we urge that sound considerations of policy (discussed *infra*, pp. 63-72) support the applicability of the equal-population principle, at least to all of the forms of local governmental bodies before the Court in the instant cases. Finally, despite the large number of these local bodies, we believe that the experience of recent years shows that the practical problem of judicial administration (see the discussion *infra*, pp. 107-118) is a wholly manageable one.

II. REASONS OF SOUND PUBLIC POLICY SUPPORT APPLICATION OF THE EQUAL-POPULATION PRINCIPLE TO LOCAL GOVERNMENTAL BODIES

A. LOCAL GOVERNMENTS PLAY VITAL ROLE

In *Reynolds v. Sims*, 377 U.S. at 564-565, this Court described the historical role of State legislatures in American political life:

State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings

of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure.

Similarly, local governments have always been of critical importance in our democratic system. The town meeting in colonial New England is perhaps the earliest example of American government at the local level. In the early nineteenth century, De Tocqueville praised local self-government in the United States as follows:

Local assemblies of citizens constitute the strength of free nations. Township meetings are to liberty what primary schools are to science; they bring it within the people's reach; they teach them how to use it and how to enjoy it. A nation may establish a system of free governments but without the spirit of municipal institutions, it cannot have the spirit of liberty."

In similar vein, Lord Bryce, another leading analyst of American government, observed: "Democracy needs local self-government as its foundation."

American local government is, of course, rarely based upon town meetings today. Instead, as we have seen, most local units are governed by a council or board or some other representative group, together with elected executives. Still, local government—government closest to the people—lies at the root of

"De Tocqueville, *Democracy in America*, ch. 5, quoted in 1 McQuillin, *Municipal Corporations*, 330 (1949).

"Bryce, *Modern Democracies*, Vol. I, p. 320, quoted in 1 McQuillin, *supra*, at 331.

democratic institutions. The Kestenbaum Commission, appointed by the President in 1955, urged that it should be the basic premise of American government to "use the level of government closest to the community for all public functions it can handle," since "every citizen has the opportunity to participate actively and directly" only at "the lowest levels of government." "Citizens are able to participate more actively in local government because they are likely to have more familiarity with the issues and greater concern for the outcome. Local governments also offer the possibility of flexible solutions to specific local problems.

Viable government at all levels is the plainest requisite of our complex society. The growth of federal functions emphasizes, rather than lessens, our dependence on the effective exercise of governmental power at the State and local levels. Decentralized government is not a relic of the nineteenth century; it remains essential to the philosophy and practice of democracy. *Reynolds* and its implementation give promise of revitalization in our State capitols. Application of the equal-population principle will hopefully have a like effect in our city halls and county squares.

Local government is not merely important because it is closest to home; it also has great and growing practical effect on the daily lives of citizens. This is clear whether emphasis is placed on the increasing

* H.R. Doc. No. 198, 84th Cong., 1st Sess., 6, 47. Decentralized government not only maximizes citizen participation; when government operates effectively at the local level, public responsibility is accentuated, local officials are more responsive to community interests, and scrutiny of government action is enhanced.

number of subjects conferred to the jurisdiction of local units or on the rapidly rising amounts of money they collect, administer, and expend. For example, local governments—cities, counties, school districts, and the like—either alone or in conjunction with the States—have responsibility over law enforcement, the administration of justice, correctional institutions, public hospitals, welfare, public education, libraries, sanitation, fire protection, streets, local transportation, sewage, leasing and building codes, zoning, parks and recreation, and myriad other matters. These areas constitute the very marrow of community life—education for children, security for families, the physical make-up of the neighborhood, and necessary public services and utilities. At the same time, property taxes, still the principal source of funds for most local governments, are of great importance to homeowners, tenants, and businessmen. Decisions as to these local matters, which are so vital to daily living, may frequently be of greater immediate significance to citizens than determinations made in the State capital or in Washington.

Local governments are assuming increasingly greater importance, particularly in the 212 metropolitan areas where, as of 1960, 113 million Americans lived. In urban areas they tend to have greater freedom and authority because of home rule, and more and more people have been moving to these areas. At the same time, urbanization has greatly increased the pressures on local governments through rapidly accelerating demands for a wide variety of public services. Furthermore, the complexity of life

in densely populated urban areas has led to new and difficult problems, and to the development of new local governmental programs relating to slum clearance, urban renewal, public housing, welfare and poverty, public health, mass transportation, water and air pollution, juvenile delinquency, land-use planning, and the like. The federal government has been directing increasingly large amounts of funds to deal with these problems either through the States or directly to local governments. The ability to solve them, however, clearly depends on the vigor and effectiveness of government at the local level.

Another significant consideration involves annual expenditures. Government spending at the local level is substantial and is increasing rapidly.⁴⁴ In the fiscal year ending in 1964 city governments spent 18.9 billion dollars; county governments expended 8.9 billion dollars in 1962; and additional billions were spent by school and other special-purpose districts.⁴⁵ These figures have been rising at the rate of about eight percent a year, considerably faster than federal expenditures. In comparison, State governments had total expenditures of 42.6 billion dollars in fiscal 1964.⁴⁶

⁴⁴ During the ten-year period 1954-1964, total revenue for cities grew 97 percent, expenditures were up 96 percent, and total indebtedness was increased by 106 percent. For local governments other than cities, revenue increased 121 percent, expenditures 115 percent, and total indebtedness 129 percent. The Municipal Year Book 1966, 256.

⁴⁵ The Municipal Year Book 1966, 257; 1962 Census of Governments, Vol. IV, No. 2, "Finances of County Governments," 1.

⁴⁶ The Council of State Governments, The Book of the States, 1966-1967, 173.

While on the average expenditures by local governments are much smaller than those of State governments, this is not invariably so. New York City had expenditures of 3.2 billion dollars in the fiscal year ending June 1964. This is more than any State except California and New York. Another seven cities and one county had expenditures of over 200 million dollars, while seven States had expenditures below this amount. Eight other cities and counties had expenditures of over 100 million dollars per year. Consideration of these financial figures alone indicates that local governments can hardly be characterized as insignificant parts of the governmental structure.

B. MALAPPORTIONMENT HAS DAMAGING EFFECTS UPON THE FUNCTIONING OF LOCAL GOVERNMENTAL BODIES

In *Reynolds*, 377 U.S. at 567, the Court pointedly stated:

The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. . . .

Malapportionment at the local level almost invariably results in local bodies which are substantially less responsive to the more populous areas of the cities, counties, or special districts. Yet, these are the very areas where the problems are apt to be most acute.

¹⁰⁷The Municipal Year Book 1966, 262-263; The Council of State Governments, The Book of the States, 1966-1967, 178-179; 1962 Census of Governments, Vol. IV, No. 2, "Finances of County Governments", 68-195 (Table 11).

The burgeoning suburbs have more serious educational, law-enforcement, planning, and other problems than nearby rural areas. Even more acutely, the deprived centers of our large cities are plagued by poverty, dilapidated housing, inadequate education, crime, congested traffic, and other problems which they are finding it increasingly difficult to solve. In addition, these areas are often heavily populated by minority groups which are subject to both poverty and discrimination.

It seems clear that, if local governments are to cope meaningfully with the grave problems of modern urban America, all citizens must be fairly and fully represented in the local governing bodies. Local governments are constantly forced to difficult choices: whether more funds should be spent in deprived areas than others; whether public housing should be built and where it should be located; what sort of urban renewal programs should be pursued; what kinds of new educational programs should be developed; and, critically, how additional funds to support various programs can be raised. If decisions such as these are to be made in the democratic tradition, they must be made by governing bodies which are truly representative, are sensitive to the needs of the affected community, and are committed to an unrelenting search for solutions. The needs are far too pressing to engage in the wasteful luxury of stalemate and ineffectiveness in local government. Regardless of the assistance provided by the federal and State governments, there is no doubt that the intractable problems of our

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urban areas cry out for effective and concerted governmental activity at the local level.

C. NEWLY ENFRANCHISED VOTERS HAVE A GREAT INTEREST IN
FAIRLY APPORTIONED LOCAL BODIES

In *South Carolina v. Katzenbach*, 383 U.S. 301, 308, this Court observed that the Voting Rights Act of 1965 (42 U.S.C. 1973) "was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." Yet, the salutary goal of that legislation will not be fully realized if discrimination against minority groups can be perpetuated, albeit indirectly, by the maintenance of malapportioned local bodies. There is only scattered evidence that existing malapportionment at the local level is racially motivated. But little foresight is needed to predict that, if malapportionment at the local level is sanctioned by this Court as constitutionally permissible, pressure to adopt such schemes will mount.

During the first year and a half following the passage of the Voting Rights Act, approximately 459,000 Negro citizens were registered as voters for the first time in the five States which comprise the deep South.* For the first time in their lives these citizens are electing, or will soon be electing, representatives to serve them at all levels of government, including the local level. This massive registration effort could largely be undermined if the vote secured on the one hand could be grossly undervalued on the other.

* Alabama, Georgia, Louisiana, Mississippi, and South Carolina. Figures were compiled by the Department of Justice and the Civil Rights Commission.

Moreover, the intent of Congress could well be effectively frustrated, at least in part, if a pattern of malapportionment at the local level should eventuate. Although, in appropriate circumstances, racially based gerrymandering is subject to constitutional challenge, if districts at the local level could be grossly disproportionate in population, little need for such gerrymandering would exist in order to accomplish the same objective. Compare *Gomillion v. Lightfoot*, 364 U.S. 339, with *Wright v. Rockefeller*, 376 U.S. 52.

Effective involvement in government at the local level may be far more meaningful for newly enfranchised voters than the right to vote for legislators in a population-based State legislature. The most urgent needs of these citizens and their most pressing interests will often relate to matters within the purview of local officials. County and city governments and, perhaps most importantly, school boards have competence and control over those specific, everyday matters and programs in regard to which progress toward equality in rights and opportunity can be most expeditiously and effectively advanced. Matters such as public housing, building codes, sanitation, public transportation, health services all touch the daily lives of these citizens most directly, and all are largely administered at the local governmental level.

Moreover, constituencies at the local level are relatively small, and the representative-voter relationship thus tends to be far more direct. While the voices of minority group representatives at the national and State level might be somewhat muted by those of the majority, local governing bodies, importantly depend-

ent on these voters for election and reelection, might be expected to be more responsive to minority groups and more concerned with their detailed, day-to-day problems. To rely only on properly apportioned State legislatures and the federal government to meet the needs and promote the welfare of these citizens is to engage in wishful thinking and invite years of delay, dissatisfaction and frustration. These new voters deserve the rights as well as the responsibilities of full citizenship at all levels of government. Malapportionment at the local level, if its perpetuation is long countenanced, will seriously inhibit, for "millions of non-white Americans," that participation "on an equal basis in the government under which they live," so proudly promised by the Voting Rights Act of 1965.

III. THE EQUAL-POPULATION PRINCIPLE APPLIES TO EACH OF THE SEVERAL KINDS OF LOCAL GOVERNMENTAL BODIES HERE INVOLVED

We have discussed the general considerations of principle, logic and policy which support the applicability of *Reynolds* to local governmental bodies. We now turn, more specifically, to the particular kinds of governmental bodies involved in the instant cases, using them as prototypes in discussing the potential scope of the equal-population principle and whether any distinctions should be made, in regard to its applicability, among the various types of governmental bodies operating on the local level.

¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 337.

ALL GOVERNING BOARDS OF COUNTIES AND MUNICIPALITIES WHICH ARE ELECTED FROM DISTRICTS ARE SUBJECT TO REYNOLDS' EQUAL-POPULATION REQUIREMENT

In *Reynolds*, this Court characterized State legislatures as "instruments of government elected directly by and directly representative of the people" (377 U.S. at 562) which are "responsible for enacting laws by which all citizens are to be governed" (*id.* at 565). This characterization is equally applicable to the governing bodies of counties and municipalities. Indeed, these "little legislatures" do not differ in any relevant respect from State legislatures. They are ordinarily empowered to enact ordinances of general applicability and perform functions affecting all local residents. Moreover, these bodies are almost invariably governed by elected representatives who, it is contemplated, will be responsible and responsive to the voters. Thus, the same "personal" and "basic" right involved in voting for representatives in a State legislature (*id.* at 561) is exercised in electing members of a city council or county board.

That such local governmental bodies generally derive their legal existence from the State legislature and exercise delegated, rather than inherent, powers does not impair the analogy.¹⁰ That fact is relevant only to the extent that it demonstrates the State's

¹⁰ Although the discussion herein refers only to county and city governing boards, since these are the kinds of bodies involved in the instant cases, many of the same considerations apply to township boards as well, especially where such bodies exercise general governmental powers. See the discussion *supra*, pp. 16-19.

¹¹ See the discussion in note 43, *supra*.

involvement in, and responsibility for, malapportionment at the local level. Of course a State might determine that members of county boards and city councils will be appointed by the Governor or the State legislature. We do not contend that the States must establish any particular form of local government, or that citizens have a federal constitutional right to elect county supervisors or city councilmen. But such units are found in and throughout every State, and the States have almost uniformly determined that they will be governed by elected representatives. Having so decided, they may not confer the privilege of voting for these representatives in a manner which dilutes the weight or debases the effect of some citizens' votes because of where they happen to reside within the political subdivision.

It is no answer to say that State legislatures, properly apportioned under the mandate of *Reynolds*, will provide an adequate remedy for malapportionment at the local level, and that the courts, including this Court, should leave the matter wholly to the political process. Most courts, as we have seen, have disagreed with such an approach, except as a temporary matter. And, although the States have ultimate authority over the apportionment and districting of governmental units, the actual role played by the legislatures in drawing district lines varies considerably. The Alabama legislature designed the districts for the Houston County Board of Revenue and Control, the Virginia General Assembly adopted the districts approved in a popular referendum in Virginia Beach, and the Texas legislature played no part at all in determining the districts for the election of Midland

County commissioners." Moreover, even assuming a new breed of legislators with a philosophical commitment to reapportionment, there is no reason to believe they will have any greater political stake in, or any more eagerness for, proper apportionment of local governmental bodies." And even if the legislator representing a particular locale wishes to have the county board redistricted through the enactment of local legislation, the matter remains primarily one of limited concern and he may be unable to persuade a sufficient number of other legislators to effectuate his proposal. If the matter is ordinarily handled through general legislation having statewide effect, the legislator's problem would probably be further compounded and even more difficult. At all events, the important constitutional right involved should not be left to the

"Involved in *Avery v. Midland County*, pending on petition for certiorari, No. 958, this Term (see 406 S.W. 2d 492).

"Indeed, it has been argued that reapportionment of the State legislatures, by giving greater political power to urban areas, may intensify resistance to local reform. See Note, Reapportionment, 79 Harv. L. Rev. 1228, 1273 (1966). On the other hand, at least several State legislatures, viz., Wisconsin, Michigan and New York, and perhaps a few more, have taken action to correct malapportionment of local bodies, and bills to this end are presently pending in a few more States. See Wis. Sess. Laws, 1965, Ch. 20, § 7, amending Wis. Stat. Ann. § 59.03; Mich. Stat. Ann. §§ 5.369(1)-(15); see also R. 491; 175-184, relating to a New York enactment vetoed by the Governor. Where the underrepresented voters are in a minority—a problem no less serious than the underrepresentation of a majority—legislative correction of local malapportionment seems less likely. And State legislators will often represent districts in which some citizens are overrepresented and some underrepresented in their local bodies, and will wish to avoid the matter if possible.

County and other local bodies, and will wish to avoid the matter if possible.

vagaries of the political process, at least not without a clear statement of the constitutional prerequisites and the prodding of a prompt judicial remedy. ~~As~~ this Court said in *Lucas* (377 U.S. at 736):

Except as an interim remedial procedure justifying a court in staying its hand temporarily, we find no significance in the fact that a non-judicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature. * * *

As discussed earlier, the method of electing city councils and, occasionally, county boards is generally determined by a charter adopted by the electorate, and subject to amendment by the electorate. And, at least in some States, initiative and referendum procedures exist at the local as well as the State level. But the fact that the voters have themselves designed, or acquiesced in the existing apportionment, and have a means available to effect a change, does not make judicial action inappropriate. Once again, *Lucas* settles that question (*ibid.*):

Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, "One's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.

Counties and cities, while not the most numerous, are probably the most familiar kind of local govern-

ment. They are general-function units exercising important and substantial governmental powers which touch each citizen's ordinary and everyday affairs. There can be no serious doubt about the applicability of the equal-population principle of *Reynolds* to the governing boards of these basic units of government. Three of the instant cases are illustrative in this regard.

1. No. 491. In our view, this case presents the strongest possible situation for application of the equal-population principle. The Board of Supervisors of Suffolk County is the legislative and policy-determining body of the county. When this litigation was commenced, its members were elected from districts having a maximum population-variance ratio of 132 to 1. Noting that the action attacked "the provision of the Suffolk County Charter whereby the County Board of Supervisors, which has a local legislative authority, is to consist of the elected Supervisors of each of the county's ten towns," the court below stated (R. 491; 125-126):

The basic theory of the action is disparity of representation. Concerning disparity, there can be no question. The ten towns of Suffolk were never of equal population; town lines were not drawn on a population basis and did not profess to be so drawn. In addition, over the years radical population changes as a result of economic and industrial developments have taken place in eastern Long Island. * * * The eastern area remains thinly populated; the western has become rather densely populated. Thus, for example, the town of Shelter Island finds itself about as it was 150 years ago

with its population stabilized at some 1,300 persons, whereas the towns of Islip, Huntington and Babylon, to take extreme cases, have some 172,000, 126,000 and 142,000 persons, respectively.

Each town has elected its chief executive officer (the supervisor) and no fault can be found with this practice. The trouble arises, so aver the plaintiffs, because the supervisors of the ten towns constitute the Board of Supervisors of the County which is the legislative body of the County. * * *

As further noted by the court below (R. 491; 136, n. 6): "The five least populous towns having approximately 10% of the county's population have five supervisors with voting strength equal to the five supervisors representing the remaining 90%."

The district court found that the apportionment scheme in Suffolk County resulted in invidious discrimination. After allowing ample time for political or legislative relief, the court ordered the Board to adopt and submit to the electorate a new plan of government with a properly apportioned governing board. That decision, in our view, was clearly correct, and, assuming that a three-judge court was properly convened, should be affirmed."

"That Suffolk County voters approved the charter containing the challenged apportionment plan is without constitutional significance, under *Lucas*, 377 U.S. at 731-732, 736-737. Nor is the long history of Suffolk County and its towns a justification for the existing plan, under *Reynolds*, 377 U.S. at 579-580. We express no view on the lower court's holding the Suffolk County apportionment invalid under the New York as well as the federal Constitution (see R. 491; 199). We discuss the possible jurisdictional problem in this case at pp. 126-128, *infra*.

Two somewhat ancillary issues involved in this case deserve mention. One arises from the fact that the supervisors are members of the Board by reason of their election as the chief executive officers of the towns within the county. This circumstance does not weaken the case, in our view, because Board membership is not only a very important responsibility in itself, but is undoubtedly more important than the functions performed as town executive. The right to an equally weighted vote in electing local governmental bodies cannot be subverted through the use of *ex-officio* representation or by combining the representative function with other duties of greater or lesser importance.

Another issue relates to the use of weighted voting as a remedial device in apportionment cases, the district court having ordered a weighted voting system adopted as an interim measure, pending a permanent legislative remedy (see R. 491; 199). Recognizing the difficulty in having a reapportionment plan drawn by a malapportioned board, yet reluctant to allow further delay, the court sought a plan which would provide a prompt, yet fair, remedy." In this respect, despite having some reservations about weighted voting as a permanent solution, the court below followed the example of the New York State courts in other cases involving local governmental units." But it

"Under the court's ordered plan, each member of the Board is given the number of votes equal to the quotient of the population of his town divided by 5,000, to the nearest whole number, but no supervisor would have less than one vote (R. 491; 199).

"Citing *Seaman v. Fedourich*, 262 N.Y.S. 2d 591 (Sup. Ct., Broome Co.), and *Shilbury v. Board of Supervisors*, 260 N.Y.S.

did not simply order a weighted voting plan into temporary effect; the court also directed the Board to develop a plan or plans for its consideration and for eventual submission to the county electorate. And later, when various plans had been submitted, the court expressly noted that one of the proffered plans "is defective in that it provides for straight weighted voting by the Supervisors of the Board as presently constituted" (J.S. 491; 15a). No specific plan was ordered into effect or even approved by the court. Rather, the court simply directed the board to submit to the electorate in November 1966 a charter amendment composed of various proposed, constitutionally valid plans for permanent apportionment of the county board (R. 491; 199).

In these circumstances, it does not appear that the question of the propriety of a weighted voting scheme as a permanent measure is properly raised here, and a discussion of that question does not seem warranted. On the other hand, the adoption of a weighted voting scheme as a "stopgap" measure, for use until a new permanent plan is devised, approved, and put into effect, seems plainly proper as an appropriate temporary remedial technique which a court in its discretion might utilize (see *Reynolds*, 377 U.S. at 585). When used in this fashion, weighted voting provides a reasonable alternative to either allowing the existing malapportionment to be perpetuated for a considerable period of time or taking the fashioning of a permanent apportionment plan out of the hands of the people and their elected representatives.

2d 981 (Sup. Ct., Sullivan Co.). See also *Graham v. Board of Supervisors*, 373 N.Y.S. 2d 419, 421 (Ct. App.), approving a weighted voting plan "solely as a temporary expedient."

2. No. 624. This is a rather straightforward case without a complicated election scheme. Five of the six members of the Board of Revenue and Control of Houston County, Alabama, are elected from districts by the electors in each of five prescribed districts. Sixty-one percent of the population and sixty-nine percent of the total assessed value of property are located in one district, and the maximum population-variance ratio is approximately 6 to 1.

Appellees assert that the Board possesses only minimal powers and is concerned primarily with the rural area of the county lying outside the most populous district. The first point is adequately refuted by a mere recitation of the Board's authority, which extends over highways, public health and welfare, sanitation, hospitals, waterworks, and all county property, and includes the power to tax, condemn property and issue revenue bonds." The second point is

"Some of the opinions in the cases heretofore considered (*supra*, pp. 44-55) contain an enlightening discussion of the powers and functions of the respective county governing boards there involved. See, e.g., *State ex rel. Sonneborn v. Sylvester*, 132 N.W. 2d 249, 256 (Wis. Sup. Ct.), noting that the State legislature "has granted a substantial bundle of legislative powers to county boards and may grant additional substantial powers," and that "the county today is a unit of government with vital powers over the lives of its residents"; *Bailey v. Jones*, 139 N.W. 2d 385, 388 (S. Dak. Sup. Ct.), stating that among the powers of county boards "are the authority to enact rural and airport zoning regulations; construct and repair bridges and highways; designate through or main highways and the speed thereon; establish and maintain public parks, county fairs, and free libraries; contribute to health centers; provide for assistance [sic] and deputies in county offices; generally supervise the fiscal affairs and levy taxes on all property in the county. * * * In effect they both manage and govern the counties"; *Hanlon v. Towey*, 142 N.W. 2d 741, 747 (Minn. Sup. Ct.), noting that "the county board's power with respect to taxation,

also without merit. As stated by this Court in *Reynolds*, "people, not land or trees or pastures, vote" (377 U.S. at 580). It is equally true that people, not land, use highways, libraries, and hospitals. People, not trees, require public welfare and sanitation facilities, and people, not pastures, pay taxes. The services performed by the Board are, under the legislation establishing its authority, intended for the benefit of all residents of the county. Certainly, taxes which support such services are paid by all county residents without regard to the district of residence. Yet, only five percent of the county's expenditures for the construction and maintenance of public roads was inside the city limits of Dothan (R. 624; 91, 119). Malapportionment of the county board cannot be justified on the ground that overlapping or

the county budget, capital improvements, welfare, health, the administration of justice, zoning, and many other areas of public service is quite different in variety and scope than that possessed by an administrative or special-purpose unit of government"; *Martinovich v. Dean*, 256 F. Supp. 612, 615 (S.D. Miss.), stating that county boards have "been invested with vast authority and responsibility by the legislature. * * * They have legislative, executive and quasi-judicial powers, duties and responsibilities. They have full jurisdiction over roads, bridges and ferries. They equalize ad valorem assessments for taxes for the whole county and fix the tax levies for the county, for supervisors districts and for county schools. They may acquire lands by purchase or by eminent domain for county purposes and may sell county property. They authorize and approve expenditures of public funds for a long catalogue of governmental purposes. They issue bonds for the county * * *. They, in effect, are purchasing agents for the county and many of its offices and agencies. They have zoning responsibilities, promotional authority, and subsidizing powers for certain activities and undertakings. They can issue subpoenas and punish for contempt. * * * In short, they are, to a large extent, the government of their county."

additional services are provided by the city—paid for, of course, by the residents of Dothan.” There is, of course, no constitutional prohibition on a governmental unit, being organized with sole responsibility and taxing authority outside the city limits of Dothan. But, so long as the Board exercises general authority over the whole county, and taxes accordingly, there is no justification for deviation from population-based districting.

A majority of the district court panel, alluding to the absence of any definitive decision of this Court, denied the relief sought on the grounds that (1) mere numerical imbalance in an apportionment scheme “falls short of proving invidious discrimination” and does not warrant judicial intervention (R. 624; 61); (2) Dothan residents “have a clearly available political remedy,” and the question of redistricting may “safely be committed” to a properly apportioned State legislature (R. 624; 62); and (3) the Board is a non-sovereign political subdivision of limited powers and does not exercise clearly “legislative” functions to the extent necessary to invoke the equal-population principle (R. 624; 63).

Both of the latter points—the adequacy of the political remedy and the scope of the Board’s powers—have been discussed previously (*supra*, pp. 74-77 and pp. 81-83).” The first point is refuted by this

“ See, however, *Hanlon v. Towey*, 142 N.W. 2d 741, 747 (Minn. Sup. Ct.), and *Note*, 11 S. Dak. L. Rev. 386, 395 (1966).

“ Contrary to the lower court’s suggestion, the application of the equal-population principle cannot, in our view, be made to turn on whether the governing body’s functions are labelled “legislative”, “administrative”, “executive” or some combination of such terms. Neither the right to cast an equally

Court's decision in the *Lucas* case, a companion to *Reynolds*. Indeed, there the Court found Colorado's legislative apportionment constitutionally deficient on a more slender record (377 U.S. at 734-735). In *Lucas*, unlike here, there had been no long-continued failure to reapportion—the apportionment invalidated had been adopted in November 1962. Nor was there, as here, an allegation of whimsical, or purposeful, discrimination; and in *Lucas* the Court rejected the argument that the availability of a political remedy (there, initiative ~~and~~ referendum) justified anything more than a temporary staying of relief (*id.* at 736-737). Thus, in our view, the court below erred in upholding the existing districting arrangement and, assuming that a three-judge court was properly convened, its decision should be reversed." As Judge Johnson stated in dissent, the court below should at least have retained jurisdiction and stayed proceedings "to allow the State a reasonable time to adopt a valid scheme of reapportionment" (R. 624; 71)."

3. *No. 724*. Most of the issues raised in this case have been dealt with previously, although, unlike Nos. 491 and 624, which involve county boards, at issue

weighted vote nor the importance of the particular local governmental body involved depends on such labels. Some of the offices involved in *Gray v. Sanders*, 372 U.S. 368, we note, were State "executive" offices." Limiting the equal-population-principle to bodies exercising "legislative" authority has some superficial appeal, but disregards the right to cast an equally weighted vote for members of other kinds of bodies elected from districts. In this regard, see the concurring opinion in the *Strickland case* (256 F. Supp. at 836).

"We discuss the possible jurisdictional problem in this case at p. 128, *infra*."

"As to Judge Johnson's views on the applicability of *Reynolds*, see note 55, *supra*."

here is the districting scheme for the election of the city council of recently expanded Virginia Beach, Virginia.²² The only novelty stems from the use of so-called "7-4 plan," under which each of seven members of the council must reside in and declare his candidacy from one of the seven boroughs in the city, while no residence requirements relate to the other four seats.²³ The maximum population-variance ratio among these boroughs is 39.8 to 1.

An argument is made that, since all eleven members are elected at large by all voters of the city, no member should be considered to be a representative of any particular area. However, the rationale for the 7-4 plan, and the use of disproportionately populated boroughs, was to insure representation for the rural interests in the less populous boroughs.

²² Most city councils have essentially all of the substantive powers commonly possessed by county boards, and, indeed, significantly more authority in some instances, particularly where home-rule municipalities are concerned. Some of the cases discussed previously involved city councils instead of county governing boards, and no significant distinctions have been drawn between the two kinds of bodies insofar as the applicability of the equal-population principle is concerned. Indeed, while much of the litigation in New York has involved county boards (see note 48, *supra*), the basic court of appeals decision, *Seaman v. Fedourich*, 209 N.E. 2d 778, was in a case challenging the composition of a city council. Similarly, the Fourth Circuit's early and leading decision in the *Ellis* case (352 F. 2d 123) involved the Baltimore City Council.

²³ Although an argument is made that, by failing to appeal from an earlier order, appellants conceded the applicability of the equal-population principle, and that the only question here raised is whether the particular plan at issue comports with the constitutional requirement, we take no position on that question and assume *arguendo* that the threshold question of applicability is presented here as in the other three cases. In regard to the jurisdictional question presented by this case, see the discussion *infra*, pp. 125-126.

Indeed, there can be no other sensible explanation of the scheme.

We do not suggest that a scheme of at-large elections with district residence requirements is, *ipso facto*, unconstitutional.²² Our submission is, rather, that when the prescribed residence districts are of disparate population, voters residing in the more populous districts suffer a qualitative impairment of their vote of the same stature and constitutional significance as the quantitative impairment suffered by voters in *Reynolds* and the companion cases. The freedom of choice of electors in the more populous districts is substantially curtailed vis-à-vis the choice of electors in the sparsely populated districts—their right to vote is simply not the same right as that accorded to those living in the less populous areas. Certainly no individual is entitled to have whomever he personally selects as the representative for his district; nevertheless, he is entitled to the same breadth of choice in casting his vote that is available to other electors voting in the same political unit. While the weight of all votes cast in electing councilmen is literally the same,²³ the character and effect of the votes vary

²² See, e.g., *Beed v. Mann*, 237 F. Supp. 22 (N.D. Ga.), holding that such a scheme, without more being shown, is not *per se* invalid.

²³ Of course, the choice of a majority of the voters in a particular residence district may be overridden by the voters generally. But the choice of the voter in a more populous district, as to certain of the seats to be filled, is limited to candidates required to reside in a less populous district. Despite the at-large feature, those residing in such a favored district are in effect accorded separate representation above and beyond that to which their number would entitle them. It is simply "ignor-

according as the elector resides in a heavily or sparsely populated residence district. Simply stated, under such a scheme voters are treated differently on the basis of where, within the city, they happen to reside. That, under *Reynolds*, is impermissible.

This Court's decision in *Fortson v. Dorsey*, 379 U.S. 433, does not command otherwise." No question was raised or discussed there regarding disparity among the populations of the several residence districts. Indeed, as appears from Mr. Justice Douglas' dissent, the districts were quite close in population, the maximum population-variance ratio among the [ing] the practical realities of representation" to say that all councilmen represent all voters in the city, and that the at-large feature saves the scheme (*Fortson v. Dorsey*, 379 U.S. 433, 437-438).

"In *Fortson* the question before the Court was simply whether the creation of multi-member districts for the election of legislators was *per se* unconstitutional, as the lower court had held (228 F. Supp. 259). Noting that in *Reynolds* the Court had "rejected the notion that equal protection necessarily requires the formation of single-member districts" (379 U.S. at 436), the Court concluded that county-wide voting in several multi-district counties did not deny residents of those counties a vote equally weighted with that of residents in single-member constituencies (*id.* at 437). Continuing, the Court carefully narrowed its holding (*id.* at 439): " * * * [O]ur opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause. It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us. * * *

Fulton County districts being 1.1 to 1." Moreover, in *Burns v. Richardson*, 384 U.S. 73, this Court indicated that inquiry into the manner in which residence requirements were established and the way in which residence districts were drawn was necessary before such a scheme could be approved. The Court there stated that an invidious effect may be shown "if, in contrast to the facts in *Fortson*, * * * districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire

379 U.S. 433, 441. See the opinion by Circuit Judge Haynsworth in which such equality was thought to be crucial in *Fortson*. *O'Shields v. McNair*, 254 F. Supp. 708, 714 (D. S.C.). See also *Montgomery County Council v. Garrett*, 292 A. 2d 164, where the Maryland Court of Appeals held that a scheme involving an at-large election of all members of a county governing board, where five of the seven members were required to reside in districts grossly unequal in population, was unconstitutional. There one of the residence districts contained 54 percent of the county's population, while two of the others contained only three and four percent, respectively. While placing considerable reliance on the Fourth Circuit's decision in the instant case, the Maryland court stated (292 A. 2d at 166): "That a requirement of residence by a legislative representative in a district malapportioned as to population is unconstitutional, even though election be by all the voters of the political subdivision of which the district is a part, was foreshadowed by *Fortson v. Dorsey*, 379 U.S. 433 * * *." *Fortson* was decided, in the view of the Maryland court, "on the premise that the [residence] districts were equal in population" (292 A. 2d at 166). With that view of *Fortson* we completely agree. See also *Grey v. Board of Supervisors*, 292 A. 2d 176, 178 (Md. Ct. App.), and the opinion of the lower court in No. 491, rejecting the so-called Albertson plan under which each of the ~~two~~ Suffolk County towns would be represented by one supervisor, but all supervisors would be elected by county-wide balloting, stating that this scheme "would appear not to rectify but to perpetuate the malapportionment that now exists" (R. 491; 193). Compare, however, that court's later statement that such a scheme was "probably, if marginally, constitutional" (J.S. 491; 16a).

district * * * (384 U.S. at 88). If the geographical distribution is critical, and may be appropriately inquired into, then surely *Fortson* does not foreclose a holding that the 7-4 plan is invidiously discriminatory in regard to those residing in the more populous residence districts."

The district court in the instant case was clearly troubled by the disparities in population but found that the plan was justifiable as an interim measure for the period of "transition".²⁶ The plan was defended before that court on the ground that it allowed for growth and changes in population (R. 724; 97, 103-104). Yet, the court of appeals found that growth in the immediate future would almost certainly occur

²⁶ That the problem here at issue is not so narrow a one as it might initially appear to be is indicated by figures (see note 24, *supra*) showing that a large number of county boards are elected under schemes providing for at-large elections but with residence district requirements. A number of members of city councils and other local governmental bodies are similarly elected (see note 26, *supra*). And *Martinovich v. Dean*, 256 F. Supp. 612, 616 (S.D. Miss.), shows that a pattern of shifting to at-large elections while retaining the previously existing districts simply as residence districts, though unequal in population, might develop. In that case the court specifically noted that it was not passing on the validity of such an arrangement.

²⁷ The illustration given in footnote 2 to Judge Hoffman's opinion (R. 724; 111), despite its superficial plausibility, clearly fails to justify the plan. If the candidate from Pungo is the most qualified and popular candidate under this scheme it may fairly be assumed that he will be under a proper one. On the other hand, his large vote may be due to extraneous factors (note that nine other candidates ran unopposed). Moreover, that a candidate who lost in his home district won at large may merely indicate that he was the lesser of two evils. It does not imply that he would have beaten a different potential candidate drawn from anywhere in the unit or from a residence district equal in population to all other such districts.

in those districts which are already more heavily populated (R. 724; 118). In fact, estimated population figures for 1964 show that the urban areas grew by a greater percentage (R. 724; 109), and that the maximum population-variance ratio increased from 39.8 to 1 in 1960 to an estimated 43.8 to 1 in 1964 (R. 724; 80). The difficulties stemming from the consolidation and transition of Virginia Beach's governmental structure can be adequately met in ways which do not impair the right to vote. For example, special taxing districts were formed as part of the city charter to pay for indebtedness incurred and benefits conferred by the component governments before consolidation. Maintaining of compact constituencies was also cited as a rationalization for the 7-4 plan as drawn, but if this factor does not justify disparities in the districts from which State legislators are chosen," then it seems inconceivable that it could justify the disparities here.

* See the dissenting opinion of Mr. Justice Stewart in *Lucas*, 377 U.S. at 756-757. See also the opinion of the Fourth Circuit in the instant case, which noted (R. 724; 121-122): "Moreover, confessedly, the Virginia Beach plan was purposed, and drafted with an eye, to include in the makeup of the council the representation of the peculiar interests of each borough. It was architected to give voice to the agricultural or non-urban concerns of the smaller boroughs. However understandable, reasons of this kind may not be counted in appraising the Constitutionality of an apportionment," citing *Reynolds*, 377 U.S. at 562. See also *Davis v. Mann*, 377 U.S. 678, 692.

Most of the State legislative cases were viewed as involving underrepresentation of urban and suburban areas and overrepresentation of rural areas. A similar situation is presented in all of the instant cases, even No. 724, although a city council is involved. However, such an urban/rural dichotomy will not be presented in at least a number of local government apportionment controversies, such as, for example, most of those relating to city councils, since the area involved (unlike Virginia Beach) will generally be completely urban in character.

The court of appeals found that the 7-4 plan violated the Equal Protection Clause and ordered the district court to retain jurisdiction pending legislative action. In rejecting the argument that, despite the disparate populations of the various residence districts, the at-large aspect of the plan saved it from constitutional attack, the Fourth Circuit noted that full compliance with the Fourteenth Amendment was wanting because, under the 7-4 plan, "the imbalance in representation in the council is obvious" (R. 724; 119). That court pointed out that the smallest borough, or residence district, was accorded the "same assured representation" as the largest borough in the city. In distinguishing *Fortson* the Fourth Circuit stated that in that case the Court "explicitly noted the absence of any substantial inequality among the [residence] districts" (R. 724; 121). Concluding that "it is not readily conceivable that the Court would have given its endorsement" to a scheme involving such "a vast disparity" between the populations of residence districts as is here presented, the Fourth Circuit observed (R. 724; 121):

Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give, or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in repre-

representation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan. . . .

If a State were to provide for the election of State legislators at large, but establish residence districts unequal in population, it is impossible to conceive of this Court's upholding such a scheme under *Reynolds*, *Lucas*, *Fortson*, and related cases. No difference in result should occur because such a system is established at the local rather than the State level. *Reynolds'* equal-population principle may not be so readily subverted. In our view, the decision of the court of appeals was correct and should be affirmed.

A. SCHOOL BOARDS WHICH ARE ELECTED FROM DISTRICTS AND ARE NOW GOVERNED BY THE EQUAL-POPULATION PRINCIPLE OF REYNOLDS

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . [and] is the very foundation of good citizenship. . . .

Those words are no less true today than they were in May 1954. Education unquestionably plays a

Brown v. Board of Education, 347 U.S. 483, 493.

critical role in our lives and remains a matter of foremost concern of government and the citizenry. To be sure, education is rarely a purely local responsibility. Yet no one will gainsay that local units commonly exercise considerable autonomy and a vital discretion in this area.

Nor is the public interest and controversy with respect to education by any means limited to the problem of racial segregation." Education is the concern of all citizens, whether or not they have children of school age, and it may well arouse more general interest than any other governmental function. School boards are by far the most numerous and common of the various types of local governmental bodies, and their pervasive effect in the community is directly felt by all.

In addition to performing a critical function, school boards often operate rather independently of State or local control, and exercise substantial powers which not only affect school children, through their authority over facilities, personnel, books and curricula, but also affect all citizens, through the power to tax and to take property under eminent domain, and the authority to fix budgets and to administer federal assistance programs. The overwhelming majority of school boards are elected, which indicates a wide preference for direct participation by the citizen in the

* There is no blinking the fact, however, that malapportioned school boards which do not include minority group representation at least roughly equivalent to population could be expected to have more difficulty in dealing with racial problems in the educational system, and would probably be less attuned to minority group needs in regard to education.

shaping of educational policies. Moreover, because school boards are generally single-function governmental units, a desire that issues regarding education be isolated from other issues of governmental concern and that specific viewpoints on education be expressed in the elective process seems plainly indicated. In these circumstances, the right to vote for school board members must be vigorously protected against undervaluation. It is of no less, and indeed may be of more, importance than the right to vote for other sorts of representatives. Indeed, such has been the ruling of the other lower federal courts which have definitively passed on the question of the applicability of the equal-population principle to school boards. *Delosier v. Tyrone Area School Board*, 247 F. Supp. 30 (W.D. Pa.); *Strickland v. Burns*, 256 F. Supp. 824 (M.D. Tenn.) (see the discussion *supra*, pp. 51-52, 54-55)."

No. 430. The Kent County School Board has authority to appoint a county superintendent, prepare a budget and levy taxes, recommend library books, conduct special programs and transfer areas between school districts (see R. 430; 143-148). Plainly the Board exercises influential control over educational policies and practices in Kent County, Michigan."

"Another case involving a challenge to a school board districting scheme was decided without reaching the question of the applicability of the equal-population principle. *Detroit Edison Co. v. East China Township School District No. 3*, 947 F. Supp. 296 (E.D. Mich.). Cf. *Pitts v. Kunzman*, 251 F. Supp. 962, 964-966 (E.D. Pa.); *Elbert v. Kunzman*, 254 F. Supp. 870 (E.D. Pa.).

"County school boards in Michigan are not treated as independent governments by the Bureau of the Census. 1962 Census

Yet, a majority of the three-judge panel concluded that the equal-population principle was inapposite."

Most of the considerations involved in determining the applicability of the equal-population principle of *Reynolds* at the local level have already been discussed. Those considerations are, in our view, equally applicable to elected school boards. The problem remaining in the instant case arises from the two-step

of Governments, 304. Apparently, the reason is that they do not have final approval over the maximum amount of their budgets (see Mich. Stat. Ann. § 15.3298(1)(c) and 1962 Census of Governments, 15-16). However, the budget is approved by an elected assembly organized just like other local governments, and that assembly elects the Board. Since the attack here is not solely against the composition of the Board, but against the whole election scheme, including the assembly, our position in this case is not inconsistent with our adoption of the definitions and terminology of the Bureau of the Census (see *supra*, pp. 14-15).

"In denying relief the court below did not rely on the fact that the case involves a school board, but rather indicated a reluctance to apply the *Reynolds* doctrine to local governments in general. Not only did the majority state that "[t]he facts and issues in connection with this case are very ably set forth in the opinion of Judge Fox" (R. 480; 220), but they also indicated broadly that they "do not agree that the decisions to which reference is * * * made require the District Courts of the United States to review the manner of apportionment and constitution of each and every board and agency of the several states * * *" (R. 480; 221). Inquiry into whether the particular election scheme involved in this case is one as to which the equal-population principle applies, even if applicable as a general matter to local governmental bodies, including school boards, is of course not foreclosed by the lower court's view that that broad question was raised. But the majority's position does indicate that they perceived the broad question to be presented, and did not decide the case on the somewhat narrower ground.

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election system which is used in selecting the County School Board, and is unrelated to the fact that the unit involved is a school board."

Members of the Board are not elected from districts. Consequently, there can be no attack on the apportionment of the Board itself. Rather, the constitutional objection, properly considered, is focused specifically on the apportionment of the assembly which elects the Board. That assembly is composed of one representative from each of the 39 boards of education for the various local school districts within the county. Each has one vote, irrespective of the number of people represented, in electing the five Board members. The maximum population-variance ratio among these school districts is about 2038 to 1.

Unfortunately, there was little helpful discussion in the opinions of the lower court directed to the problems raised by this scheme." It would appear that

"No view is here expressed on the question as to standing asserted by some of the parties. We assume *arguendo* that at least some of those on each side of the litigation are proper parties. In addition, we do not discuss any questions relating to the annexation and detachment of certain areas, as between various school districts, nor whether the particular transfer of territory, which initially gave rise to this litigation, should be upheld on the ground that the approval of the Board, though malapportioned, was the action of a *de facto* body. It would appear that such questions lack federal constitutional significance and, we note, the question as presented in the Jurisdictional Statement filed in this case relates only to the applicability of the Equal Protection Clause to the election system here involved.

"Judge Fox, in dissenting, characterized the scheme as 'essentially a unit system of voting—each school district within the county receives one vote in the election of each of the five members of the county board' (R. 430; 200). In his view, the system was one 'paralleling the 'county-unit' system in

the argument against the applicability of *Reynolds* is one grounded principally on the asserted absence of a State-conferred right to vote for County School Board members. Another formulation might be that the Board is not intended to be responsive to, or representative of, the general citizenry, but rather to have such a relationship only as to the constituent boards of education, and that school districts are not "persons" having rights protected by the Fourteenth Amendment." But such an argument ignores the critical fact that it is school children, not school dis-

validated by the Supreme Court in *Gray v. Sanders*, 372 U.S. 368 * * * (R. 430; 201), and he found "a gross disparity, amounting to invidious discrimination, between the representation afforded the Grand Rapids School District * * * and the representation of other constituent school districts on the Board" (R. 430; 204). Finding that the Michigan legislature had in fact conferred a right to vote for a representative county school board, despite the two-step election system, he concluded that the arrangement was constitutionally defective. In our view, *Gray* is of considerable relevance, but does not completely carry the day here. There the county-unit system was simply a device for assigning different weight to the votes cast in various counties, and did not involve the election of "units" which would then select among various candidates. However, *Gray* undoubtedly would have been decided the same way had the votes been cast for "electors" who would then select among candidates according to the expressed wishes of a majority of those voting for them. Here the "electors" themselves serve a function other than simply making selections according to the expressed wishes of those voting for them, since each school district's representative in electing the county board members is himself elected initially as a member of that school district board, and not just to elect county board members, as the hypothetical "elector" in the *Gray* situation would have done. In short, *Gray*, in our view, is analogous but not necessarily controlling.

* * * See, e.g., *Williams v. Mayor and City Council of Baltimore*, 280 U.S. 36.

tricts, who read library books and require special educational programs. It is taxpayers, not boards of education, who supply the revenue for the Board." They are "persons" protected against unconstitutional State action by the Fourteenth Amendment.

It is not contended that the residents of Kent County have an "absolute" or constitutional right to elect the County School Board. Nor is it suggested there can never be a two-step election scheme, wherein the voters elect an assembly which in turn selects the members of the governing body, to which the equal-population principle is inapplicable. But once it is determined that the body is to be a representative one, and that its membership is to be determined, directly or indirectly, through an election system, the system devised must be one which treats each member of the electorate equally.¹⁰⁰ No person's vote may be

¹⁰⁰In the *Strickland* case the plaintiffs consisted of parents of children attending or having a right to attend public schools operated by the county school board (see 256 F. Supp. at 828). While perhaps a wise cautionary measure to avert an attack on standing, it would seem that all residents and taxpayers entitled to vote for members of an allegedly malapportioned school board would have sufficient standing to maintain such an action.

As stated by the Court in *Gray v. Sanders*, 372 U.S. 368, 379: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, and wherever their home may be in that geographical unit." Here the geographical unit which County School Board members represent is the entire county, yet those residing in the Grand Rapids School District, for instance, have only 1/20 of the voting influence in selecting such members, although comprising over 55 percent of the county's total population. *Fortson v. Morris*, 385 U.S. 231,

undervalued, even though it passes through an intermediary. To decide otherwise would be to allow the intricacies of a sophisticated system to work an infringement not allowed under simple and straightforward schemes.¹⁰¹ But the "Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'" (*Reynolds*, 377 U.S. at 563, quoting from *Lane v. Wilson*, 307 U.S. 268, 275).¹⁰²

the Georgia gubernatorial election case, does not require a different result than that which we suggest here. The factual situation there was unique, and in *Fortson* the Court clearly intimated that, had the Georgia legislature been grossly malapportioned, as the electing assembly in the instant case is, it would have reached a contrary conclusion (see 385 U.S. at 235).

¹⁰¹ Dissenting Judge Fox's concern that allowing the election system to stand would in effect permit the legislature "to completely nullify the result of *Reynolds* * * *" is not unwarranted (R. 430; 211). Indeed, if such a scheme meets constitutional muster, "a limitless circumvention" of *Reynolds* not only at the local level, through delegating functions to local bodies selected by similar means, but also at the State level might be possible. If, in the wake of and to avoid the effect of *Reynolds*, a State determined that its legislators would be selected through a two-step process, whereby the voters in each county, for example, would elect an "elector" who would then, along with the other "electors" so determined, choose the members of the legislature, it seems plain that such an attempted circumvention would not be permissible, under *Gray* and *Reynolds*. If such a scheme would not be allowed at the State level, no convincing reason exists for sanctioning it at the local level.

¹⁰² In this regard, see also *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653, a companion to *Reynolds*, where the Court stated: "However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside."

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Here the court below denied relief in part because this Court had not yet applied the equal-population principle to local government bodies (see note 54, *supra*).¹⁰⁰ The time is now ripe for that application. Despite the difficulties incident to the two-step election process, no distinction should be drawn, we submit, between Michigan county school boards and other school boards—or between school boards and local bodies generally. Thus, in our view, the judgment below was erroneous and should be reversed.¹⁰¹

We stress that, should the Court entertain doubts as to the proper disposition of this case because of the peculiar characteristics of the two-step election system, such doubts would have no relevance to the basic

¹⁰⁰ In our view, dissenting Judge Fox, and impliedly the judges in the majority, properly rejected an argument grounded on the availability of a political remedy to achieve popular election of school board members. The existence of such a remedy is, under this Court's decision in *Lucas*, of very limited constitutional significance (377 U.S. at 736-737) (see the discussion *supra*, pp. 74-76). And such a remedy was not in any event practically available under the instant circumstances, since, as pointed out by Judge Fox (R. 430; 215): "The procedure outlined in M.S.A. 15.3294 (2) and (3) is constitutionally unacceptable, requiring as it does that a majority of constituent school districts, representing more than 50% of the children on the last school census in the county district, must adopt resolutions in favor of such a procedure. The problem with this plan is that the Grand Rapids School District, with 48.04% of the school-age children in the * * * [county], and 55.6% of the total population, would need the votes of nineteen other school districts (there being a total of 39 in Kent County) to bring about a popular election. Thus again, patently, a small minority has effective power to frustrate the will of the great majority."

¹⁰¹ No possible jurisdictional problem appears to exist in this case. See the discussion *infra*, p. 126.

question of whether *Reynolds* is generally to be applied to the election of school boards, most of which, across the country, are elected directly by the people. That question is a pressing and important one, and we urge that that much at least be laid to rest.

C. GOVERNING BOARDS OF SPECIAL DISTRICTS WHICH ARE ELECTED FROM DISTRICTS SHOULD ALSO BE COVERED BY THE EQUAL-POPULATION PRINCIPLE

While the issue of malapportioned special districts¹⁰⁶ is not raised in any of these cases, a brief discussion of this matter might be helpful in considering the general problem of fair districting and proper apportionment at the local government level. The question is relevant if one wishes to explore the ultimate scope and logical consequences of a holding that the equal-population principle of *Reynolds* applies at the local level.

Special districts are the fastest growing category of local government today, having increased by 27 percent between 1957 and 1962.¹⁰⁷ This growth is the result of many factors and the reasons for the creation of any particular district may be difficult to determine.¹⁰⁸ Often, the primary reason is that the ordinary units of local government lack the authority to undertake a particular function or are unable to finance a certain activity because of limitations on tax

¹⁰⁶ By "special districts" we mean all those special-function units of local government other than school boards, as discussed *supra*, pp. 20-21.

¹⁰⁷ From 14,424 to 18,323. See 1962 Census of Governments, 1.

¹⁰⁸ See U.S. Advisory Commission on Intergovernmental Relations, *The Problem of Special Districts in American Government*, ch. VII.

rates, indebtedness, or the ability to issue bonds. However, some special districts are formed because of citizen dissatisfaction with the performance of established governmental units or as a result of an unwillingness of such governments to undertake or expand a particular function. Perhaps the somewhat indiscriminate growth of special districts will be curbed by revitalized, properly apportioned, general-function units and by appropriate action by re-apportioned State legislatures. In any event, special districts are a common feature of our governmental system, and some, though not many, of the governing boards of the bodies are elected from districts (see *supra*, p. 21).

The arguments made earlier in support of applying the equal-population principle of *Reynolds* to "little legislatures" and school boards logically pertain to special districts as well. Recognizing that special districts exercise delegated authority, are often created at the initiative of the voters, lack general "legislative" duties, and share overlapping jurisdiction with other units, none of these considerations, we submit, justifies malapportionment with respect to the election of their governing bodies. A substantial number of special districts have authority to levy property taxes and issue bonds, and there appears to be a close correlation between taxing power and an elected governing board (see note 30, *supra*). Some special districts perform important and substantial governmental functions having a direct effect on the everyday lives of the residents of the community involved; others plainly do not. Some deal with matters of

general interest to most or all citizens, while others handle matters of particular interest to certain segments of the population which are of little concern to the people generally. Such variations apart, however, it would seem, at least *prima facie*, that where State or local law directs a system of election from districts for choosing the members of the governing board of a special district, the equal-population principle requires that the districts be substantially equal in population. To hold otherwise would depart from the basic teaching of *Reynolds*—that voters cannot be treated differently simply on the basis of where they happen to reside within the geographical unit to be represented.

A few writers have suggested that at least some special districts need not be covered,¹⁰⁰ and it is not in-

¹⁰⁰ See Weinstein, *Effects of Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Colum. L.Rev. 21 (1965); Note, 44 Neb. L.Rev. 850 (1966). Weinstein's suggested distinction between general-function and special-function units, insofar as the applicability of *Reynolds* is concerned, while having some practical appeal (and apparently appealing to some of the lower courts, which have suggested that only bodies exercising "legislative" powers are within the constitutional ambit), does not, in our view, withstand close analysis. Where the right to elect members of bodies from districts is conferred, it is not entirely reasonable to require voters to be treated equally in some situations, but not in others, depending on the nature, powers and functions of the particular body. A blanket rule that no special-function units are constitutionally required to be apportioned on a population basis would be little more than an open invitation for States to circumvent the requirement as to general-function units by conferring more powers on the former bodies and by creating new special-function units rather than delegating additional powers to general-function units. In addition, the

conceivable that a doctrine could be worked out which would stop short of an all-encompassing rule. For example, only those districts exercising "substantial" powers or "significantly" affecting the residents might be required to apportion on a population basis; in other words, some sort of *de minimis* approach might be adopted. However, the task of selecting and consistently applying criteria of that order would undoubtedly present grave difficulties. A clear and sharp line between applicability and inapplicability would be far more easily administered.

Another approach might be to look at the number of different activities engaged in, or functions performed by, the particular special district. But this would not seem to be a viable criterion either, since a single-function district may have a greater impact on individuals than a district with several fields of interest. Nor would it seem profitable to select certain, more critical fields of interest and require only those districts involved in such activities to be fairly apportioned. Every function is potentially critical and a potential source of controversy.¹⁰⁰ Moreover, situations may exist in which a multiple-function dis-

suggested dichotomy would exclude school boards from the equal-population requirement. School boards are a substantially different sort of body from the many variegated kinds of other special-function units. For the reasons discussed *supra*, pp. 92-94, it would be most undesirable, in our view, for school boards not to be within the equal-population principle.

¹⁰⁰ See *Evans v. Newton*, 382 U.S. 296 (involving a public park), and *Brown v. Louisiana*, 383 U.S. 131 (relating to a public library).

trict will combine one or more critical functions, in greater or lesser proportion, with several non-critical functions. Again, it does not solve the problem to engage in the labelling of bodies as "legislative" or "administrative" (see note 79, *supra*). Finally, if some, or all, special districts were not required to be apportioned on a population basis, there would be problems in distinguishing between "special districts" with many functions and powers and "general governments" with only a few. And should a general government which must be properly apportioned begin to spin off or delegate functions to special districts, which are not required to be apportioned on a population basis, determining at what point that government is no longer required, or the special districts begin to be required, to be apportioned on a population basis would be a virtual impossibility.

These are but a few of the complexities which might be encountered. Actually, such line-drawing questions are more appropriate for a legislative rather than a judicial body. Under a rule that all governmental bodies whose members are elected from districts are covered by the equal-population requirement of *Reynolds*, a State can still draw such lines among various local governmental bodies simply by determining which are to be elected from districts and which elected at large or not elected at all. The argument for a consistent and thoroughgoing application of the constitutional principle at stake is not an unrealistic one, and the practicalities support that

approach rather than one characterized by tenuous and artificial distinctions.¹¹⁰

¹¹⁰ Passing mention should be made of several related problems which are not before the Court presently but which involve the applicability of the equal-population principle to various kinds of governmental bodies apart from those here discussed. One such problem relates to elected judges. In *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga.), the court held that a system under which superior court judges were nominated from various judicial circuits but elected on a statewide basis did not violate the Equal Protection Clause. First the court stated that it could discern no "discrimination among voters or unequal weighting of votes of the sort condemned by the one man-one vote principle" (234 F. Supp. at 577), noting that no contention was made that the judges must be nominated "from circuits apportioned equally according to population" (*ibid.*, n. 1). The court concluded that "the fact that the statewide electorate may override the choice of the circuit in no way offends the principles of *Baker v. Carr* and its progeny" (*ibid.*). Continuing, the court stated (*ibid.*): "[E]ven assuming some disparity in voting power, the one-man-one-vote doctrine, applicable as it is now to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." See also *Romitt v. Kerner*, 256 F. Supp. 35 (N.D. Ill.), which involved a challenge to the apportionment of Illinois Supreme Court judicial districts. Without passing on the applicability of *Reynolds* to the election of judges, the court upheld a constitutional amendment designed to correct the admitted malapportionment of judicial districts but which deferred implementation to allow the present judges to complete their terms and succeed themselves. In the course of its opinion, the court stated (256 F. Supp. at 46): "We have little doubt that, in a proper case, there is a valid distinction between ap-

IV. APPLICATION OF THE EQUAL-POPULATION PRINCIPLE TO
LOCAL GOVERNMENTAL BODIES IS JUDICIALLY MANAGE-
ABLE

We do not blink the fact that a holding in the instant cases that *Reynolds* applies generally at the local

plying the 'one man, one vote' rule in a legislative reapportionment case [and] to the election of a state supreme court judiciary * * *. Under the facts of this case, as they now exist, we do not reach or decide that interesting question." Compare *Davis v. Curry*, 21 C.D. L.A. 39 (W.D. Mo.). Application of the equal-population principle to judges elected from districts within the area of their court's jurisdiction presents a question different from that involved in the instant cases. Judges are not generally regarded as serving in a representative capacity, and valid considerations apart from population may underlie apportionment of judicial officers. At all events, there is no need to resolve this question at this time.

Several other cases have related to the applicability of this Court's apportionment decisions to the election of persons to political party offices. In *Lynch v. Torquato*, 343 F. 2d 370, the Third Circuit upheld the dismissal by the lower court (228 F. Supp. 262 (W.D. Pa.)) of a suit challenging the election of a Democratic Party county chairman by precinct committeemen and seeking to require the election of the chairman by popular vote of all registered Democratic voters, on the ground that several precincts contained widely disparate numbers of registered Democrats. Holding that *Reynolds* and *Gray* were inapplicable to "the internal management of a political party" (343 F. 2d at 372), the Third Circuit affirmed. *Lynch* involves a somewhat unique and potentially difficult problem, but on its facts appears, in our view, to have been correctly decided. Later decisions relating to local governmental bodies have consistently and properly distinguished *Lynch*. Applicability of the equal-population principle to political party elections may well depend on the function performed by the body being elected, as noted by the Third Circuit (*id.* at 372-373); there all candidates for public office were nominated in primaries and not at party conventions. In this regard, see also *Davis v. Sullivan County Democratic Committee*, 21 C.D.L.A. 55 (N.Y. Sup. Ct., Sullivan Co.), relying on *Lynch* and reaching a similar conclusion. No such issue is of course raised in the instant cases.

level of government will potentially affect thousands of local governmental bodies. This has led some to argue (as was also argued in *Baker v. Carr* and *Reynolds v. Sims*) that the problem is beyond the bounds of judicial manageability, and that only chaos and confusion in government will result from judicial intervention.¹¹¹ The problems are formidable to be sure—in large part because of past failures to confront them—but we believe that the apprehensions are overstated.

Viewed from hindsight, most of the anxieties and forebodings prompted by this Court's decisions in *Baker* and *Reynolds* have not in fact materialized. Predictions that federal courts would be continuously harassed by apportionment litigation, repeatedly faced with making difficult political determinations and persistently engaged in the tedious task of redesigning districts, have not been borne out by subsequent developments. Progress toward population-based representation has been made in virtually every State, without disrupting the functioning of State government and often with minimal involvement by the federal

¹¹¹ Such an argument necessarily assumes that considerations relating to manageability, such as an increased judicial workload, the inconvenience accompanying adjustment of apportionment arrangements, etc., are relevant factors even though the rights asserted are constitutionally based and individual in nature. Certainly federally protected rights cannot be adjudicated—either upheld or rationalized away—on the basis of how much judicial burden and adjustment and inconvenience a particular decision is likely to have. In deciding *Brown v. Board of Education*, 347 U.S. 483, the Court was well aware that its holding would require change in a large number of then-segregated school systems in various States (see *id.* at 495), but did not rule differently on that account.

judiciary.¹¹² In the almost three years since *Reynolds* was decided, this Court has had before it for decision after plenary consideration only four State legislative apportionment cases.¹¹³ While the number of local bodies is far greater, that experience nevertheless augurs well for the successful application, in a workable and satisfactory way, of the equal-population principle at the local governmental as well as the State legislative level. A full accommodation will take somewhat longer, but much of the groundwork has already been prepared.

That there are as many as 90,000 local governmental bodies¹¹⁴ in this country emphasizes the significant impact which these units have on the daily lives of all citizens. The size of the figure also points up the potential scope of the malapportionment problem and demonstrates the need for a clear statement by this

¹¹² See 55 National Civic Rev. 394-400 (July 1966), for a State-by-State summary. There is good reason to believe that the responsive chord struck by *Baker* and *Reynolds* will be found to exist in regard to local government apportionment as well. Indeed, the degree of acceptance at the local level is indicated by the small number of such cases in which review in this Court has been sought, despite the volume of litigation in the State and lower federal courts.

¹¹³ *Fortson v. Dorsey*, 379 U.S. 433; *Fortson v. Toombs*, 379 U.S. 621; *Burns v. Richardson*, 384 U.S. 73; *Swann v. Adams*, No. 136, 1966 Term, decided January 9, 1967.

¹¹⁴ This represents a substantial decrease in local units over the last ten years. See 1962 Census of Governments, 1:

Type of unit	1962	1967	1962
Counties	3,043	2,680	3,062
Municipalities	17,067	12,315	18,967
Townships	17,144	17,798	17,302
School districts	34,678	30,664	67,988
Special districts	18,323	14,494	12,340
Total	91,185	102,941	119,758

Court as the applicability of *Reynolds*. But it by no means implies that local malapportionment is judicially unmanageable. Since the equal-population principle comes into play, in our view, only where there is an election scheme involving the use of districts, the number of local governmental bodies possibly affected is immediately reduced substantially. Thus, while 2,516 of the 3,049 county governing boards (about 82.5 percent) are elected pursuant to schemes involving at least some use of districts, the estimated percentages for other types of governing bodies are much lower. Extrapolation from available figures (using 1962 data) and sample surveys indicates that about 40 percent of the 17,997 municipalities, less than 20 percent of the 34,678 school districts, less than 20 percent of the 16,323 special districts, and a comparably small percentage of the 17,144 townships have governing boards which are elected, in whole or in part, by districts (see note 25, *supra*). These calculations indicate that, as a composite figure, roughly 25 percent of all governing boards of local governmental units are potentially subject to a requirement of population-based apportionment and districting. And at least some of the bodies potentially affected are presently apportioned on a population basis; as to them, no litigation to compel adjustment would be necessary.

Unlike most of the litigation involving apportionment at the State level, much of the litigation involving apportionment of local bodies would undoubtedly be brought in State rather than in federal courts. That has been the experience to date. The development seems a desirable one, not only because it eases the burden upon the federal judiciary, but because the greater familiarity of State courts with local

governmental systems will in general facilitate application of the equal-population principle to the various kinds of local bodies found in the several States. State courts have traditionally dealt with local government apportionment matters,¹¹⁸ and can be expected to have little hesitancy on this score, once the constitutional principle has been clearly articulated by this Court. On several occasions this Court has specifically encouraged State courts to involve themselves in the adjustment of legislative representation.¹¹⁹ This has borne fruit in the local government field (see the discussion *supra*, pp. 41-49); no less than seven State courts of last resort have already held the equal-population principle of *Reynolds* applicable at the local level.

¹¹⁸ See, e.g., *State ex rel. South St. Paul v. Hetherington*, 61 N.W. 2d 737, 741 (Minn. Sup. Ct.); *State ex rel. Scott v. Masterson*, 183 N.E. 2d 376 (Ohio Sup. Ct.); *Griffin v. Board of Supervisors*, 384 P. 2d 421, (Calif. Sup. Ct.), involving local government apportionment controversies decided before *Reynolds* and under State, rather than federal constitutional, law. Compare *Opinion of the Justices*, 209 A. 2d 471 (N.H. Sup. Ct.).

¹¹⁹ In *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, a companion of *Reynolds*, the Court stated (377 U.S. at 674): "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes." And in both *Soranton v. Drew*, 379 U.S. 40, and *Forty-Fourth General Assembly of Colorado v. Lucas*, 379 U.S. 698, the Court vacated the judgments of the lower federal courts and remanded the cases for further consideration in light of supervening State Supreme Court decisions relating to legislative apportionment. Finally, in *Scott v. Germano*, 381 U.S. 407, in a *per curiam* opinion, the Court stated (381 U.S. at 409): "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."

Reapportionment at the local level is well under way or already accomplished, as to many local bodies, in a significant number of States. In States where the local governmental body in question is apportioned pursuant to a general State statute, one decision holding that statute unconstitutional will often be sufficient to stimulate a general and statewide adjustment, without the need for a specific challenge to the composition of each and every local body of that kind.¹¹⁷ And, even where such a situation does not exist, several decisions establishing the basic guidelines for local reapportionment would probably induce compliance on the part of units not expressly bound by the judgments rendered. In addition, once the applicability of the equal-population principle is definitely established by this Court, it seems reasonable to assume that appropriate action by the State legislatures might be expected in many States to insure effective compliance on a statewide basis.¹¹⁸ In short, there is no reason to assume that litigation attacking the existing apportionment and districting arrangements for countless governmental bodies will prove necessary in order to implement a decision holding *Reynolds* applicable at the local level.

¹¹⁷ See, e.g., *State ex rel. Sonneborn v. Sylvester*, 132 N.W. 2d 249, where the Wisconsin Supreme Court's decision held invalid a single State statute prescribing the formula for county governing board apportionment in all but two of Wisconsin's counties; *Hanlon v. Towey*, 142 N.W. 2d 741, where the Minnesota Supreme Court struck down a single State statute relating to districting for county governing boards in all but several Minnesota counties. See also *Mauk v. Hoffman*, 200 A. 2d 150 (N.J. Super. Ct., Ch. Div.).

¹¹⁸ See note 73, *supra*, in regard to State legislative activity in this direction; see generally, however, the discussion *supra*, pp. 74-76.

10 Nor can it reasonably be concluded that the requirement to reapportion or redistrict will bring local governments to a standstill or render them ineffective. Judicial relief will not, in all likelihood, be required as to the large bulk of presently malapportioned arrangements. And, as shown in the State legislative apportionment litigation, the judiciary can generally provide for relatively smooth transition with no significant impairment of the normal operations of government, by recognizing the *de facto* legality of acts performed by a malapportioned body and by staying injunctive relief and avoiding direct involvement in the redrawing of district lines while the parties and the officials concerned pursue a political remedy. In many instances, the necessary reapportionment or redistricting can be accomplished by the local body itself; in others, it will require only *pro forma* approval by the State legislature. In those States where local apportionment is accomplished by the State legislature, the use of committees or commissions or study groups to draft and propose comprehensive remedial legislation would minimize the burden on the legislature and the disruption of governmental operations. Since apportionment at the local level is very rarely dealt with in State constitutions, in contrast to legislative apportionment, there would be no need to engage in the time-consuming and sometimes cumbersome processes of constitutional amendment.

Nor will the federal judiciary be overly taxed. In the first place, State courts can be expected to handle a lion's share of whatever litigation may eventuate. State courts which were reluctant to exercise jurisdiction in legislative apportionment controversies, or denied their authority to do so, will be far less re-

luctant to deal with local apportionment questions. To be sure, some suits will continue to be brought in the federal courts. But in many of these cases the convening of a three-judge district court will not be necessary—in contrast to the situation in cases challenging State legislative apportionment schemes. As we shall have occasion to elaborate (*infra*, pp. 118-125), 28 U.S.C. 2281, the basic provision relating to three-judge courts, has been consistently construed as requiring a three-judge court only when a suit to enjoin the enforcement of a State statute of general and statewide application is brought. Such a situation of course invariably existed in the State legislative apportionment cases, but not so here. Typically, suits relating to apportionment at the local level involve a challenge only to a local charter or ordinance or to a State statute limited in its application to a particular political subdivision. Indeed, a number of district courts have refused to convene a three-judge court in cases involving local apportionment during the past several years on this very ground.¹¹

Assuming, therefore, that three federal judges will not ordinarily be required to sit as a district court to hear and decide, as an initial matter, local government apportionment cases, the burden on the federal judiciary will be considerably less than might first be imagined. By the same token, since no direct ap-

¹¹ See, e.g., *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), affirmed, 352 F. 2d 123, 124 n. 1 (C.A. 4); *Delosier v. Tyrone Area School Board*, 247 F. Supp. 30, 31 (W.D. Pa.); *Strickland v. Burns*, 256 F. Supp. 824, 825 n. 1 (M.D. Tenn.); *Johnson v. Genesee County*, 232 F. Supp. 563, 564-566 (E.D. Mich.); *McMillan v. Wagner*, 239 F. Supp. 32, 33-34 (S.D. N.Y.). See also Circuit Judge Bryan's opinion in support of the dissolution of the three-judge

appeal will lie from a single judge's decision, no undue burden should be placed on this Court. Rather, appeal will appropriately be taken to a court of appeals, and such intermediate appellate review will probably reduce considerably the number of appeals to this Court.¹²⁰

court initially convened in No. 724, one of the instant cases (R. 724; 74-78). Compare, however, *Simon v. Lafayette Parish Police Jury*, 226 F. Supp. 301 (W.D. La.), reversed and remanded for convening of a three-judge court *sub. nom. Simon v. Landry*, 359 F. 2d 67 (C.A. 5), certiorari denied, 385 U.S. 838. Once the pertinent principles are established, many such cases could probably be decided on the basis of stipulated facts without need for a hearing. And where three judges are required, the decision by that court would presumably have effect statewide, thus reducing the overall amount of litigation.

¹²⁰ See, e.g., *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123 (C.A. 4); *Lynch v. Torquato*, 343 F. 2d 370 (C.A. 3), in neither of which cases further review was sought in this Court. In one of the instant cases, No. 724, the appeal is taken from a decision of the Fourth Circuit reversing the judgment of the single-judge district court.

In several situations where it has been deemed inappropriate to convene a three-judge court, a non-statutory district court of three judges has sat or two additional judges have participated at the trial in an advisory capacity. *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.); *Strickland v. Burns*, 256 F. Supp. 824, 825 n. 1 (M.D. Tenn.). In both cases the two additional judges were invited by the single judge to sit with him because of the importance of and great local interest in the particular cases. Such a flexible procedure appears to provide a single district judge with a sensible and practicable way to obtain the assistance and advice of other judges in cases involving novel, difficult and substantial questions which are nevertheless inappropriate for a three-judge statutory court under this Court's consistently narrow reading of Section 2281. Appeal from a decision of such a non-statutory court would lie to the court of appeals, of course, and not to this Court, since 28 U.S.C. 1253 confers jurisdiction on this Court only in cases "required" to be heard by three judges.

What is more, once the controlling constitutional principles are definitively established, a three-judge court may be unnecessary even in those situations where, considering only the nature of the statute challenged, a statutory court might otherwise be thought to be required. Under the rule established in *Bailey v. Patterson*, 369 U.S. 31, Section 2281 becomes inapplicable once the constitutional question is "settled beyond question" and "is foreclosed as a litigable issue" (369 U.S. at 33).¹²¹

Finally, we stress that this Court need not here concern itself in any detail with the question of remedial techniques appropriate for use in local government apportionment cases. The same considerations of flexibility and equitable discretion, sanctioned by *Reynolds* and applied in subsequent cases dealing with State legislative apportionment, pertain with equal force in these cases.¹²² Indeed, remedial prob-

¹²¹ See, e.g., *Lodico v. Board of Supervisors*, 256 F. Supp. 440, 441 (S.D. N.Y.), where the court determined, in reliance on *Bailey*, that "as a matter of practical judicial administration" a three-judge court was not required. See also *Glisson v. Mayor and Councilmen of Town of Savannah Beach*, 346 F. 2d 135, 136 (C.A. 5). We do not mean to intimate that, once the question of the applicability of the equal-population principle to local governmental bodies is definitely settled by this Court, in no such cases would the convening of a three-judge court be proper. Individual cases may occasionally still require the resolution of substantial and unsettled issues, and thus not fall within the ambit of the *Bailey* rule. Nor do we mean to suggest that the jurisdiction of a three-judge court, if properly invoked as an initial matter, can be somehow lost through an intervening clarification or resolution of constitutional issues. But where the unconstitutionality of a challenged apportionment is clear, under *Bailey* three judges would be unnecessary, although a general State statute is involved.

¹²² As with State legislative cases, proper remedial techniques in local government controversies "will probably often

lems at the local level present fewer difficulties. Not only is there a body of law already developed in the lower courts; some of the remedial techniques which have been utilized in certain cases as interim measures, such as at-large elections, seem better suited at the local than at the State level.¹²²

In both situations, of course, the fashioning of permanent apportionment arrangements should be left, wherever possible, to the State and local legislative bodies and to the people. To the extent necessary, however, judicially cognizable standards are plainly available in the approaches and concepts which have been evolved, and are still evolving, in the State legislative cases, and are readily transferable to local government litigation. Similarly, as to substantive standards, the courts may readily adapt and apply precepts relating to the proper measure of population,¹²³ the maximum permissible variations from perfect equality among districts and considerations which differ with the circumstances of the challenged apportionment and a variety of local conditions" (377 U.S. at 585).

¹²² A similar remedial device—weighted voting—was used by the lower court as a temporary measure in one of the instant cases, No. 491 (see the discussion *supra*, pp. 79-80). For the reasons there stated, we do not regard the validity of weighted voting as a permanent arrangement as properly before the Court, although the voters subsequently adopted a similar plan (combining an increase in seats with weighted voting), which, however, is not yet in effect. We note, however, that Nassau County, New York, a neighbor of Suffolk County, has had a weighted voting plan in effect for a number of years.

¹²³ See generally *Burns v. Richardson*, 384 U.S. 73, 90-97. Since the Bureau of Census no longer breaks down population figures to the extent of stating the populations of subdivisions (such as wards) or of local political units separately, it may sometimes be necessary to utilize registered voter rather than total population figures in effecting local government reap-

tifying minimal departures from population-based representation,¹²¹ and the frequency with which reapportionment and redistricting is required.¹²²

V. JURISDICTIONAL DEFECTS MAY EXIST IN TWO OF THE
FOUR INSTANT CASES

All four of the instant cases come here from lower federal courts. Each of the three cases (Nos. 430, 491, and 624) in which probable jurisdiction was portionment and redistricting. *Burns* indicates that the use of registered voter figures is permissible so long as no discriminatory purpose or effect is shown (see 384 U.S. at 95-97). Compare the view of the Fourth Circuit in the *Ellis* case, 352 F. 2d 123, 126-130. See generally Weinstein, *supra* note 108, at 24; Note, 34 U. Cinc. L. Rev. 397 (1965).

¹²¹ However, the fact that local governmental bodies are almost always unicameral suggests that perhaps smaller minimal variations should be allowed, since the underrepresentation of one area in one house cannot be offset by overrepresentation in the other, as with State legislatures (see *Reynolds*, 377 U.S. at 577).

¹²² Under *Reynolds*, the frequency of State legislative apportionment was purposely geared to the decennial census taken by the federal government, since it generally provided the only reliable statewide figures (see 377 U.S. at 583-584). As a general matter, such an approach seems sufficient and expedient at the local level as well. Since local governmental bodies often have significantly smaller constituencies than State legislatures, periodic shifts and significant growth in population may have a far more dramatic effect, and result in a serious imbalance in representation, at the local level. If reliable figures are available for a particular local governmental unit, between censuses, it would not seem wholly out of the question to require the correction of gross disparities more often than once every ten years (see *Burns*, 384 U.S. at 96). On the other hand, considerations of stability and continuity in governmental organization (see *Reynolds*, 377 U.S. at 583) weigh heavily in favor of requiring adjustment no more frequently than every ten years, except perhaps upon a clear showing in an extreme case.

noted by this Court on December 5, 1966, is here on direct appeal from the decision of a three-judge district court convened pursuant to 28 U.S.C. 2281. In the fourth case (No. 724) a single judge rendered judgment and appeal was initially taken to the Fourth Circuit, which reversed, and the appeal to this Court was from that decision. An order of January 9, 1967, set No. 724 for argument along with the other three cases, postponing a determination as to jurisdiction to the hearing on the merits and directing the parties to that case to brief and argue the question of whether a three-judge court should have been convened. In light of this order, we address ourselves to the propriety of convening a three-judge court in all the cases, viewing the Court's earlier action in noting probable jurisdiction in Nos. 430, 491 and 624 as not foreclosing consideration of the jurisdictional question in those cases. As indicated in our memorandum filed in *Avery v. Midland County*, pending on petition for certiorari, No. 958, this Term, we have doubts as to whether a three-judge court was properly convened in two of the cases here on direct appeal (Nos. 491 and 624).

We have already stated our view that a large majority of suits brought in the federal courts challenging malapportionment of local governmental bodies can and should be tried before a single-judge, rather than a three-judge, district court, with appellate review initially lying in the courts of appeals (*supra*, pp. 113-115). Such an approach would have the salutary effect of lightening the burden of judicial administration placed on the federal courts in connection with this sort of litigation. Nor is it a mere

rule of convenience. Our view is wholly consistent with and follows from the long-standing interpretation of 28 U.S.C. 2281, which is read as not requiring the convening of a three-judge court to try an action seeking to enjoin a State statute of limited, as distinguished from general, application.

The objective of Section 2281, as recently expressed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154, is "to prevent a single federal judge from being able to paralyze *totally* the operation of an *entire* regulatory scheme . . . by issuance of a *broad* injunctive order" (emphasis added). "The crux of the business," the Court had said earlier, in *Phillips v. United States*, 312 U.S. 246, 251, "is procedural protection against an improvident *state-wide doom* by a federal court of a state's legislative policy" (emphasis added).¹²⁷ Accordingly, it has been held unnecessary to convene a court of three judges to entertain suits to enjoin the enforcement of an Arizona statute authorizing municipalities, by further legislative action, to assess costs of street improvements against abutting property, *Ex parte Collins*, 277 U.S. 565; a New York statute imposing taxes assessed by and for the sole use of New York City, *Ex parte Public National Bank*, 278 U.S. 101; and a Florida statute applying only to the Everglades Drainage District, *Rorick v. Board of Commissioners*, 307 U.S. 208.¹²⁸ In the latter case,

¹²⁷ See, also, *Bailey v. Patterson*, 369 U.S. 81, 83, stating that "[t]he three-judge requirement is a technical one to be narrowly construed"

¹²⁸ In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 228, the Court held that a three-judge court was not required to enjoin various officials of Prince

this Court observed (307 U.S. at 212): "Despite the generality of the language' of that Section, it is now settled doctrine that only a suit involving 'a statute of general application' and not one affecting a 'particular municipality or district' can invoke [the predecessor of Section 2281]."

It follows, *a fortiori*, that the requirement for a three-judge court is inapplicable to suits challenging the constitutionality of municipal charters and ordinances and orders of local governing boards.¹²⁹ Moreover, Section 2281 does not come into operation merely because State officials are sought to be restrained, if "the sphere of their functions" is a matter only of local concern (*Rorick v. Board of Commissioners*, 307 U.S. at 212). By the same token, the premise for a three-judge court is not satisfied "by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilents v. Sovereign Camp*, 306 U.S. 573, 579. In similar circumstances, a number of lower federal courts have

Edward County from closing its public schools, paying county tuition grants and processing applications for State tuition grants. The Court reasoned that the plaintiffs were not attacking an action which the State commanded of the county, but something the county did "with state acquiescence and cooperation," although noting that the single judge's decision "may have repercussions over the State," and stated: "Even though actions of the State are involved, the case, as it comes to us, concerns not a state-wide system but rather a situation unique to Prince Edward County." See generally Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

¹²⁹ See *Uihlein v. City of St. Paul*, 32 F. 2d 748 (C.A. 8), certiorari denied, 281 U.S. 726; *Davis v. City of Little Rock*, 136 F. Supp. 725 (E.D. Ark); *Teeval Co. v. City of New York*, 88 F. Supp. 652 (S.D.N.Y.)

concluded, in cases challenging malapportionment at the local level, that three-judge courts should not be convened. See, e.g., *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), affirmed, 352 F. 2d 123, 124 n. 1 (C.A. 4); *Delosier v. Tyrone Area School Board*, 247 F. Supp. 30, 31 (W.D. Pa.); *Strickland v. Burns*, 256 F. Supp. 824, 825 n. 1 (M.D. Tenn.); *Johnson v. Genesee County*, 232 F. Supp. 563, 564-566 (E.D. Mich.); *McMillan v. Wagner*, 239 F. Supp. 32, 33-34 (S.D.N.Y.).

In light of the narrow construction given the language of Section 2281 in these and like cases, it is clear that few apportionment cases involving local governmental bodies require the convening of three-judge courts. Most county governing boards for example, are self-apportioned. Often the State statutes merely determine the number of members of the county board and the manner of election, leaving the task of drawing districts, and apportioning the members among the districts, to the local body itself.¹²⁰ In this situation, the claim that the apportionment violates the Equal Protection Clause would not draw into question the constitutionality of the statute, but only the constitutionality of the local body's actions pursuant to the statute.¹²¹ In other instances, when the

¹²⁰ See *Barges v. Loftis*, 87 F. 2d 734, 735 (C.A. 9), where the court stated: "The fact that the county ordinance was adopted in conformity with a state plan applicable to a large number of counties in the state does not convert the ordinance passed by the county board of supervisors into a statute of the state."

¹²¹ According to this analysis, a three-judge court probably was improperly convened in *Martinovich v. Dean*, 256 F. Supp. 612 (S.D. Miss.), and improperly ordered convened in *Simon*

county government operates under a charter granted by the State or adopted by the county electorate, State statutes will have merely authorized the county to draw the charter and, usually, incorporated the charter into the State laws after it has been adopted. The apportionment of members among districts will be accomplished by the charter itself or by the governing board acting pursuant to the charter. In either case, the claim would not be that the statutes are unconstitutional, but that the charter, or the board's actions pursuant to the charter, are unconstitutional. That the charter is incorporated into the State's statutes does not lead to a contrary conclusion, for the "statute" is still one of limited application, and concerns only the county involved.

In some States apportionment and districting for county board seats is determined by the State legislature by a special statute applying only to the particular county. While the powers and duties of the board may be set out in a general statute applicable to all counties, and incorporated into the statute organizing the specific county board, no challenge would be directed at the constitutionality of these statutory provisions. Rather, the attack would properly be made only on those provisions dealing with apportionment and districting. Since such statutes would clearly be of limited application to a single county, a three-judge court would not be required.

Landry, 359 F. 2d 67 (C.A. 5), certiorari denied, 385 U.S. 838. No significance in this regard should, in our view, be attached to this Court's denial of certiorari, earlier this Term, in *Simon*.

City council seats are normally apportioned by, or pursuant to, a charter adopted by the people or granted by the State. Here again, the constitutional attack is on the charter or council action, not the legislation granting or authorizing the adoption of the charter.¹²² In the unusual instance in which a city charter is incorporated into the State statutes, such a statute is nevertheless clearly one of limited application and no three-judge court would be necessary.¹²³

Occasionally, a situation exists in which the apportionment of a local governmental body is determined by a State statute applying to all or a substantial number of units of a particular class of government throughout the State.¹²⁴ Here, even though local officials are sought to be restrained and even though it is only one particular unit whose reapportion-

¹²² See *Ellis v. Mayor and City Council of Baltimore*, 234 F. Supp. 945, 946 (D. Md.), and *McMillan v. Wagner*, 239 F. Supp. 32, 33 (S.D. N.Y.), where the convening of a three-judge court was, in our view, properly refused.

¹²³ And, in each of the situations discussed above, the same result would follow whether or not the complaint joined as defendants the Governor, the Secretary of State, the Attorney General, the State Board of Election Commissioners, or any other State official, under *Wilents v. Sovereign Camp*, 306 U.S. 573 (see *supra*, p. 121).

¹²⁴ In some instances, categories of local governments may be classified by population, or on some other basis, so that a statute may not apply to every county or city or school district. Nevertheless, if the statute challenged applies to all local governments within such a class, it should be considered to be one of general application, and, in our view, a three-judge court would be properly convened.

tionment is sought,¹²⁵ the constitutional attack is aimed at a statute which applies generally throughout the State and to all such units in the State. Thus, in such a situation, the convening of a three-judge court would be proper.

It remains only to determine how these general jurisdictional concepts apply to the particular situations here involved. Such a determination is necessary, of course, because this Court has jurisdiction on direct appeal from a judgment of a three-judge court, under 28 U.S.C. 1253, only where the action was one "required * * * to be heard and determined by a district court of three judges." Thus, if the statutory courts were improperly convened in Nos. 430, 491, and 624, appeals to the respective courts of appeals, and not this Court, should have been taken. And, in No. 724, if a three-judge court should have been convened, the single judge who decided the case lacked jurisdiction and appeal to this Court from the Fourth Circuit's decision reviewing the merits is jurisdictionally defective.

In No. 724, a single district judge properly heard and decided the case, in our view, since the challenge was directed at a city charter provision prescribing the so-called 7-4 plan. Although the city charter was enacted into State law, it is clear that that statute was one of limited application, relating only to one

¹²⁵ See *Rorick v. Board of Commissioners*, 307 U.S. 208, 212, where the Court stated: "An official though localized by his geographic activities and the mode of his selection may, when he enforces a statute which embodies a policy of statewide concern, be performing a state function" within the meaning of Section 2281.

Virginia municipality. As Circuit Judge Bryan observed in dissolving the three-judge court initially convened: "[T]he controversy is of a local nature, without statewide significance, and so not within the intendment of 28 U.S.C. 2281" (R. 724; 75). Thus, we submit, this Court's question as to whether a three-judge court should have been convened in No. 724 should be answered in the negative. A single district judge properly heard and decided the case, appeal to the Fourth Circuit from that decision was proper, and this Court's jurisdiction to review the judgment of the court of appeals is properly invoked under Section 1254(2).

Nor do we perceive any jurisdictional difficulties in No. 430. There a three-judge court was convened, and the case is before this Court on direct appeal. But there the statute challenged was one relating generally to all Michigan county school boards of a certain type. It was thus a State statute of general and statewide application and a three-judge court was properly convened under Section 2281.

Conversely, the propriety of convening three-judge courts in Nos. 491 and 624 is, in our view, questionable. In No. 491 the constitutional attack was directed toward Sections 201 and 203 of the Suffolk County Charter, which in substance provide that the county governing board shall be composed of the supervisors of the several towns of the county and that each supervisor shall have one vote. While the county charter was enacted into State law, that enactment could hardly be regarded as constituting a State statute of general application, since the charter

provisions plainly relate, and could relate, only to one New York county. That the three-judge court which sat in No. 491 was aware of the jurisdictional considerations under Section 2281 is obvious from a reading of that court's basic opinion (R. 491; 124, 128, 130-131, 133-134). Somewhat inexplicably, however, no resolution of the jurisdictional question was ever articulated by the court, which simply continued to sit as a statutory court. None of the court's orders enjoined the operation of a State statute, and the basic order simply adjudged "[t]hat Section 203 of the Suffolk County Charter is invalid as applied * * *" (R. 491; 199).¹⁴⁴ It would appear, therefore, that a three-judge court was improperly convened and

¹⁴⁴ An argument to the contrary—that the enjoining of a State statute of general application was sought so that the three-judge court was properly convened—can be made in No. 492. Here the complaint attacked not only the pertinent provisions of the Suffolk County Charter but also several general provisions of the New York County Law, Sections 150 and 103, which were, however, specifically inapplicable to counties like Suffolk which had chosen an alternative form of county government. Presumably the argument would be that, if the court held the charter provisions relating to the composition of the Board of Supervisors invalid, a "gap" in the pertinent law would be created and these general statutory provisions would then become effective, as to Suffolk County, if not also struck down by the court. Perhaps this is theoretically sound, but the court did not find it necessary even to discuss these statutory provisions and plainly did not hold them invalid or order their enforcement enjoined. Rather, the court specifically noted that the charter could be amended by local action (R. 491; 155), and supplanted the existing apportionment plan, as prescribed by the charter, with a weighted voting plan which it ordered into effect temporarily, while directing the board to prepare charter amendments which would provide for permanent apportionment on a proper basis.

that this Court lacks jurisdiction under 28 U.S.C. 1253 to reach and decide the case on the merits.

Similarly, in No. 624 the challenge was directed against a State statute prescribing the apportionment and districting scheme for electing members of the county governing board, and State officials were among the defendants named. Nevertheless, the statute at issue related only to Houston County, Alabama, and could not therefore be properly viewed as a statute having general and statewide application.¹²⁷ Unlike the situation in No. 491, the three-judge court convened in this case made no mention whatever of the jurisdictional question relating to Section 2281 and the matter was not briefed or discussed by the parties. As in No. 491, it would appear that a three-judge court was improperly convened and that the case is not properly before this Court on direct appeal.

Should the Court conclude that three-judge courts were improperly convened in Nos. 491 and 624, and that appeals accordingly do not lie here, it may never-

¹²⁷ An argument could conceivably be made that, even though the statute involved was itself literally limited in application to one county, the convening of a three-judge court was still proper, since the statute challenged was very similar in form to other statutes relating to the composition of county governing boards in other Alabama counties. Thus, the argument would go, a matter of statewide interest was actually involved, because the court's decision would have at least some precedential effect as to the apportionment of a number of other Alabama county boards. We have found no case upholding such a basis for three-judge court jurisdiction under Section 2281; indeed, *Borges v. Loftis*, 87 F. 2d 734 (C.A. 9), points to a contrary result. See note 120, *supra*.

theless enter appropriate corrective orders.¹²⁸ Appeal from a judgment of an improperly convened three-judge court lies to the appropriate court of appeals,¹²⁹ but where an appeal is taken only to this Court the time within which to appeal to an intermediate appellate court will invariably have expired. Thus, the practice developed by this Court in such situations, in order to preserve the rights of the appellants, has been to vacate the judgment below and remand the case to the district court whose jurisdiction was initially invoked for the entry of a new order. Assuming that the Court reaches and decides the question of the applicability of the equal-population principle to local governmental bodies in the other pending cases and holds in favor of applicability, such a remand need not be a time-consuming or wasteful step. No new hearings or briefs would be required. In No. 491, the single judge might well determine to adopt the opinions and orders of the three-judge court, which he joined, as his own. In No. 492, Judge Johnson, who dissented from the judgment of the three-judge court, would be free, upon remand, to enter his dissent as the opinion and judgment of the district court.

Consideration of the thorny and difficult jurisdictional problems should not, in our view, be permitted to obscure or color the broad and important constitutional question raised in these four cases. That question is simply whether the equal-population principle

¹²⁸ See e.g., *Bailey v. Patterson*, 369 U.S. 81, 84, and the cases there cited.

¹²⁹ See *Phillips v. United States*, 312 U.S. 246, 254.

of *Reynolds* applies to bodies of local government whose members are elected from districts. For the reasons developed at length in our brief, that question, we submit, should be answered affirmatively.

CONCLUSION

For the reasons stated, the judgment of the court below in No. 430 should be reversed, and the judgment of the court below in No. 724 should be affirmed. Assuming that three-judge courts were properly convened in Nos. 491 and 624, the judgment in No. 491 should be affirmed and the judgment in No. 624 should be reversed. Should the Court conclude, however, that it lacks jurisdiction on direct appeal in either Nos. 491 or 624, then the judgment should be vacated and the case remanded to the district court.

Respectfully submitted.

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MARCH 1967.

APPENDIX A-1

Section 294a of the Michigan School Code (Mich. Stat. Ann. § 15.3294(1)) provides as follows:

The members of the board shall be elected biennially on the first Monday in June by a body composed of 1 member of the board of education of each constituent school district, who shall be designated by the board of education of the constituent school district of which he is a member. The secretary shall send a notice by certified mail of the hour and place of meeting to the secretary of the board of education of each constituent school district at least 10 days prior to the meeting. The president and secretary of the board shall act as chairman and secretary, respectively, of the meeting. The term of office of each member elected to the board shall be for 6 years and shall begin on July 1 following his election, except as hereinafter provided. Not more than 2 members of the board shall be from the same school district unless there are fewer districts than there are positions to be filled. Any vacancy shall be filled by the remaining members of the board until the next biennial election. Notice of the vacancy shall be filed with the state board of education within 5 days after its occurrence. If the vacancy is not filled within 30 days after it has occurred, it shall be filled by the state board of education. Candidates for election to the board shall be nominated by petitions which shall be signed by not less than 50 school electors of the district who are registered to vote in the city or township where they reside. Any qualified elector

shall be eligible to sign as many petitions as there are vacancies to be filled. Nominating petitions shall be filed with the secretary of the board not later than 30 days prior to the date of the biennial election. The secretary shall determine the sufficiency of said petitions, and the eligibility of the candidates therein nominated. The secretary shall cause to be prepared, printed or duplicated ballots for the biennial election, listing on said ballots the names of all candidates properly nominated. If no nominating petitions have been filed for a candidate to fill a vacancy then, in this event and only in this event, the chairman of the biennial election may accept nominations for that vacancy from the floor. * * *

and the secretary of the board shall determine the sufficiency of said petitions, and the eligibility of the candidates therein nominated. The secretary shall cause to be prepared, printed or duplicated ballots for the biennial election, listing on said ballots the names of all candidates properly nominated. If no nominating petitions have been filed for a candidate to fill a vacancy then, in this event and only in this event, the chairman of the biennial election may accept nominations for that vacancy from the floor. * * *

APPENDIX A-II

Sections 201 and 203 of the Suffolk County Charter (Ch. 278, Laws of New York, 1958) provide as follows:

§ 201. The board of supervisors; general powers. The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county. It shall be the legislative and policy determining body of the county and shall, except as otherwise expressly provided in this charter, have and exercise all the powers and duties of the county together with all the powers and duties which now are, or may hereafter be, conferred or imposed on boards of supervisors by all laws applicable to the county not inconsistent with this charter. The board of supervisors shall also have such other powers and duties as are provided by this charter.

§ 203. Voting; quorum. Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government for the county or changes the voting strength of the supervisors, or which changes the location of the county seat.

APPENDIX A-III

Section 2 of Act No. 9, Acts of Alabama, Regular Session, 1957, provides as follows:

Section 2. That Houston County, Alabama, is hereby divided into five (5) Board of Revenue and Control Districts, as follows: District Number 1 shall embrace and be composed of Beats Number 1, 2, and 4 and shall be represented by the incumbent Commissioner, H. A. Hollis; District Number 2 shall embrace and be composed of Beats Number 5, 6, 7, and 11 and shall be represented by the incumbent Commissioner, F. C. Jackson; District Number 3 shall embrace and be composed of Beats Number 10, 12, and 14 and shall be represented by the incumbent Commissioner, W. Harvey Hicks; District Number 4 shall embrace and be composed of Beats Number 8, 9, and 13 and shall be represented by the incumbent Commissioner, G. D. Raley; and District Number 5 shall embrace and be composed of Beat Number 3. The Governor is authorized and empowered to appoint a member of the Board of Revenue and Control, as hereby created, effective upon the bill or act becoming a law, to serve as District Commissioner of District Number 5, and who shall serve until his successor is elected at the General Election to be held on the first Tuesday after the first Monday in November, 1958, and becomes qualified, and who shall receive as compensation the sum of \$1,200.00 per annum payable in the same manner and from the same funds of the County with which the other Commissioners are paid. One member of said Board of Revenue and Control hereby

created shall hereafter be nominated and elected by the voters of each of the above-numbered districts, and he shall have been a resident of and a qualified elector in the District for a period of two years time immediately preceding the General Election to be held on the first Tuesday after the first Monday in November, 1958, and shall continue to reside therein during his continuance in office; and the members elected shall assume the duties of their office on the first Monday after the second Tuesday in January, 1959, following their election, and shall hold office for a period of four (4) years and until their successors are elected and qualified. Candidates for membership on the Board of Revenue and Control for Houston County, Alabama, shall be nominated by the voters of his respective district in the Primary next preceding the General Election at which time they shall be elected by the voters of his respective district.

APPENDIX A-IV

Sections 3.01 and 3.02 of the Charter of the City of Virginia Beach (Ch. 147, Acts of Assembly, 1962, as amended by ch. 39, Acts of Assembly of Virginia, 1966) provide as follows:

§ 3.01 COMPOSITION. The City shall be divided into seven boroughs. One of such boroughs shall comprise the City of Virginia Beach as existing preceding the effective date of this charter and shall be known as the borough of Virginia Beach, and the remaining six boroughs shall comprise the six magisterial districts of Princess Anne County as existing immediately preceding the effective date of this charter and shall be known as the boroughs of Bayside, Blackwater, Kempsville, Lynnhaven, Princess Anne (formerly known as Seaboard) and Pungo. The council shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the city at large.

§ 3.02 ELECTION OF COUNCILMEN. On the second Tuesday in June in 1966, and on the second Tuesday in June of every fourth year thereafter, there shall be a general election at which the qualified voters of the city shall elect eleven councilmen for terms of four years beginning the first day of September next following the date of their election and until their successors are duly elected and qualified. Each candidate shall state whether he is running at large or from the borough of his residence, but otherwise, candidates shall be nominated under general law. Election and qualification of councilmen in nineteen hundred sixty-six shall terminate the terms of all incumbent councilmen even though they may have been elected for longer terms.

APPENDIX B-I

	All units	Counties	Municipalities	Townships	School districts			Special districts		
					Total	Taxing power	Elected	Total	Taxing power	Elected
Ala.	722	67	349		114	114	67	229		
Alaska	55		40		10	10	10	6	6	
Ark.	578	14	61		251	251	251	22	22	22
Ark.	1,208	78	417		417	417	417	290		118
Calif.	4,022	57	373		1,690	1,690	1,690	1,362	1,735	Most
Colo.	1,193	63	253		312	312	312	590	419	Some
Conn.	268		34	152	8	8	8	204	198	"M.T."
Del.	207	2	21		90		Few	65		
Fla.	704	67	366		67	67	67	264	65	"M.T."
Ga.	1,218	150	581		197	197	Mixed	301		
Hawaii	20	3	1					18		
Idaho	534	44	200		121	121	121	699	379	"M.T."
Ill.	6,492	108	1,351	1,433	1,540	1,540	1,530	2,128	1,980	Some
Ind.	3,001	92	546	1,009	894	894	Most	590	290	
Iowa	2,642	99	944		1,236	1,236	1,236	263	72	Some
Kan.	5,410	105	618	1,546	2,261	2,261	2,261	990	764	Most
Ky.	672	120	345		208	208	208	179	36	Some
La.	628	62	285		67	67	67	241	205	
Maine	686	16	21	470	26	26	Most	126	13	Some
Me.	351	22	162					176	16	
Mass.	886	12	30	312	26	26	Some	194	67	"M.T."
Mich.	2,516	55	509	1,250	1,906	1,906	1,906	99	7	Few
Minn.	5,212	57	945	1,922	2,343	2,343	2,343	115	24	Most
Miss.	772	32	266		186	186	Some	266	1	Few
Mo.	3,726	114	983	329	1,640	1,640	1,640	742	62	Some
Mont.	1,267	56	124		1,015	1,015	1,015	192	108	Most
Neb.	5,124	55	357	476	3,264	3,264	3,264	762	581	Most
Nev.	126	17	17		17	17	17	85	20	Most
N.H.	530	10	13	221	221	221	221	85	70	70
N.J.	1,395	21	324	228	512	512	512	396	147	147
N. Mex.	305	32	80		91	91	Most	102	24	102
N.Y.	3,002	57	612	942	1,231	1,231	1,234	970	969	
N.O.	675	100	449					126	27	Most
N. Dak.	3,025	53	266	1,267	966	966	966	246	186	Most
Ohio	3,336	88	922	1,826	833	833	833	177	67	Some
Okla.	1,959	77	533		1,225	1,225	1,225	124	19	Most
Ore.	1,469	36	226		464	464	464	727	664	Most
Pa.	6,201	66	1,008	1,555	2,179	2,179	2,177	1,396		
R.I.	97		8	31	2	2		66	63	35
S.C.	532	46	255		109	Some		142	72	Some
S. Dak.	4,463	64	307	1,072	2,940	2,940	2,940	80	10	80
Tenn.	657	95	260		14	Some	Some	266		Some
Tex.	3,327	254	866		1,474	1,474	1,474	723	266	Many
Utah	423	29	212		40	40	40	142	80	Many
Vt.	424	14	69	236	22		22	73	29	72
Va.	260	96	226					46		Some
Wash.	1,646	32	263	96	411	411	411	967	689	Most
W. Va.	369	55	224		55	55	55	55	3	Some
Wis.	3,726	72	563	1,271	1,782	1,782	1,782	66	4	Some
Wyo.	464	23	90		207	207	207	144	45	Most
D.C.	2		1					1		
Totals	91,186	2,042	17,997	17,144	24,678	(**)	(**)	15,232	9,457	(**)

"M.T." means most of those with taxing power.

**No accurate figures available.

Source: Bureau of the Census, 1963 Census of Governments, Tables 12 and 13; "Individual State Descriptions," id. at 242 et seq.

APPENDIX B-II

A. States in which members of county governing board are elected at large without restrictions:

Maine

Ohio

Oregon

Pennsylvania

Utah

Vermont

Wyoming

B. States in which members of county governing board are, or can be, elected by districts with districting under local control:

Arizona*

California*

Florida*

Idaho*

Iowa*

Kansas*

Kentucky*

Louisiana

Minnesota

Mississippi*

Missouri*

Nebraska*

New York

North Dakota*

Oklahoma*

South Dakota*

Texas*

Virginia

Washington**

Wisconsin*

C. States in which members of county governing boards are elected at large with district residence requirements, with districting under local control:

Colorado*

Indiana

Montana*

New Mexico*

West Virginia*

*State law directs local unit to district on basis of population, or on basis of population plus other factors, such as area, convenience, or compactness.

**Members are nominated by districts, elected at large.

D. States in which members of county governing board are usually elected by districts, with districting done by State legislature:

Alabama
Arkansas
Delaware
Georgia
Hawaii
Illinois
Maryland
Massachusetts

Michigan
Nevada
New Hampshire
New Jersey
North Carolina ***
South Carolina
Tennessee

*** Members are elected at large with district residence requirements fixed by State legislature.

Source: Bureau of the Census, Governing Boards of County Governments: 1965.

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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1966

NO. 724

FRANK A. DUSCH, Et AL,
Appellants,
v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER,
CORNELIUS D. SCULLY And
HOWARD W. MARTIN,
Appellees.

On Appeal From The United States Court Of Appeals
for the Fourth Circuit

BRIEF FOR APPELLEES

INTRODUCTION

Throughout this brief the appellants¹ will be referred

¹ Appellants, Frank A. Dusch, John McCombs, Edward T. Caton, III, W. H. Kitchin, Jr., L. S. Hodges, S. Paul Brown, Swindell Pollock, Kenneth N. Whitehurst, Lawrence E. Marshall, James Darden and Earl Tebault were members of the City Council of the City of Virginia Beach; John B. James, Harry Bailey, Joseph T. Crosswhite, Sr., were members of the Electoral Board of the City of Virginia Beach; V.

to as "OFFICIALS", and the appellees² will be referred to as "VOTERS".

QUESTIONS PRESENTED

"VOTERS" adopt the phrasing of the three questions proposed in "OFFICIALS'" brief, but submit an additional and decisive question is presented, namely:

Can "OFFICIALS" raise for the first time in this Court the applicability of the doctrine of One Man—One Vote to the City of Virginia Beach, where "OFFICIALS" failed to challenge the original District Court ruling that the principle was applicable, sought Legislative reapportionment based upon the applicability of the doctrine, failed to raise the issue in a second District Court hearing, and failed to argue the issue in the Court of Appeals?

STATEMENT OF THE CASE

"VOTERS" supplement "OFFICIALS'" statement of the case in the following particulars:

Alfred Etheridge was Treasurer of the City of Virginia Beach; Ivan D. Mapp was Commissioner of Revenue of the City of Virginia Beach; and William P. Kellam and P. B. White were members of the House of Delegates of the Virginia General Assembly, representing the City of Virginia Beach.

² Appellees, J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, are citizens of the Commonwealth of Virginia, of the Boroughs of Lynnhaven, Bayside, Lynnhaven and Kempsville, respectively, in the City of Virginia Beach, and are duly qualified voters, electors and taxpayers, and sued in behalf of themselves and all other citizens of the City of Virginia Beach, Virginia, similarly situated.

In 1961, Princess Anne County, Virginia, had a county form of government consisting of Six (6) magisterial districts, each being allocated One (1) supervisor, regardless of population. The Six (6) supervisors constituted the Board of Supervisors, the governing body of the county. The resort City of Virginia Beach had a councilmanic form of government, consisting of Five (5) councilmen elected at large.

Princess Anne County was immediately adjacent to the City of Norfolk, Virginia, and under the law of Virginia a city then had the right to petition a special three-judge annexation court to annex portions of a county, but not of a city.

Princess Anne County, being fearful of annexation of a portion of its lands by the City of Norfolk formed a committee to attempt to effect a merger of the resort City of Virginia Beach and the County of Princess Anne, for the admitted purpose of isolating Princess Anne County from annexation by the City of Norfolk. (R. 36) In order to obtain the consent of the resort City of Virginia Beach, the merger agreement provided that the new City would be divided into Seven (7) boroughs (R. 44), the geographical limits of one borough to be the limits of the old City of Virginia Beach, and the geographical limits of the other six boroughs would comprise those of the six magisterial districts of Princess Anne County. The name of Seaboard Magisterial District was changed to Princess Anne. (R. 44).

The borough of Virginia Beach was given five seats on the new Council and the other boroughs were given one seat each. The citizens of the respective boroughs could only vote for the Councilman assigned to his respective borough. The boroughs were tantamount to wards.

The Seven (7) boroughs and their representation on Council and population areas follows: (R. 7, 24, 25)

Representation On Council	District	Population Per District—1960	Projected Population Per District, January 1, 1964
1	Blackwater	733	862
1	Pungo	2,504	2,806
1	Princess Anne	7,211	7,957
1	Kempsville	13,900	22,254
1	Lynnhaven	23,731	37,760
1	Bayside	29,048	36,027
5	Virginia Beach	8,091	10,473

The merger agreement provided that the above apportionment of representation could be preserved through September 1, 1971, at which time the Council was required to submit a new plan for election of Councilmen to the voters. (R. 44)

As of 1960, the three (3) urban boroughs of Lynnhaven, Bayside, and Kempsville contained 66,679 people of the total population of 85,258. Seventy-eight (78%) per cent of the population had only three (3) representatives on Council or twenty-seven (27%) per cent of the representation on Council.

The total taxes realized from real estate as of April 1964 was \$4,145,821.54. Of this sum, \$970,850.04 was realized from Bayside Borough, \$707,124.54 from Kempsville Borough and \$1,471,431.02 from Lynnhaven Borough, or a total from these three districts of \$3,149,405.60, which sum represents seventy-five (75%) per cent of the total taxes realized from real estate for the entire city. (Petitioners' Exhibit #2, R. 27; R. 31, R. 32)

"VOTERS" first invoked the original jurisdiction of the Supreme Court of Appeals of Virginia as provided in Section 121 of the Constitution of Virginia (See Appendix A, I) and Sections 15.1-803 and 15.1-806 of the Code of Virginia of 1950, as amended. (See Appendix A, II)

On November 30, 1964, the Supreme Court of Appeals of Virginia held, without passing on the federal question raised by the writ of mandamus, i.e., the Fourteenth Amendment protection of the value of "VOTERS" vote, that Section 117 of the Constitution of Virginia (See Appendix A, III) authorized the legislature to grant special charters, abrogating the protection afforded by Section 121.

Having exhausted their state court remedies "VOTERS" filed the instant suit in the United States District Court at Norfolk requesting the convening of a three-judge Federal Court.³ The three-judge Court ruled that jurisdiction of a statutory court had not been established because the issue was local in character and involved an established constitutional question. (R. 76) In remanding the case to the District Court, the statutory court held that the applicability of the doctrine of "one man — one vote" was apparent and the ruling of the Court of Appeals for the Fourth Circuit in *Ellis v. Mayor and City Council of Baltimore* (4 Cir. 1965) 352 F. 2d 123 was controlling.

³ At or about the same time citizens of the City of Chesapeake, Virginia, filed a similar suit and the Virginia Beach and Chesapeake cases were heard concurrently by the Three-Judge Court and the District Court. When the District Court handed down its opinion of December 7, 1965, the City of Chesapeake secured an amendment to its charter providing for the election of councilmen at large, whereas Virginia Beach sought the "Seven-Four Plan" discussed, *infra*.

The District Judge in his opinion of December 7, 1965 (R. 78) ruled that the apportionment of councilmen as constituted under the merger agreement was unconstitutional and violative of the principle established in *Reynolds v. Sims*, (1964) 377 U.S. 533.

Following the Lower Court opinion of December 7, 1965, "OFFICIALS" passed a councilmanic resolution agreeing that a new Council should be constituted as soon as practicable providing for substantial equality of representation.⁴ On this representation the District Court stayed proceedings to allow officials to introduce a new charter to the Virginia General Assembly of 1966. (R. 82)

Officials obtained an amendment to the Charter denominated the "Seven-Four Plan" (R. 87, 88), which main-

⁴ (R. 18)

"Whereas, the drastic changes in concepts of representation brought about by decisions of the United States Supreme Court since the adoption of the city's present plan of representative (representation) (sic) have called into question the wisdom of continuing this plan; and

Whereas, members of the Council have recognized the inequalities of the present plan and are of opinion that the public interest requires that the plan be changed sooner than January 1, 1968.

Now, Therefore, Be It Resolved by the Council of the City of Virginia Beach, Virginia:

1. The present plan of representation of the Council of the City of Virginia Beach should be replaced as soon as practicable by a new plan providing substantial equality of representation.

2. The Council hereby commits itself to initiate a new plan for representation of the Council and to request its representatives in the General Assembly to introduce a bill at the earliest opportunity to amend the charter of the City of Virginia Beach to effectuate such plan and to urge its representatives to press for the prompt passage of such bill.

3. The plan will provide for the election of councilmen by one of the following methods so that under any plan the vote of one citizen will be substantially equal to the vote of every other citizen in the city:

***"

tained the same geographical limits of the boroughs and the same disparate populations condemned by the District Court opinion of December 7, 1965. The plan, admittedly, sought to insure that there would be members elected to Council from the four under-populated boroughs. (R. 93)⁵. To effect this end, the plan apportioned One (1) residential councilman to each of the Seven (7) boroughs of the city, regardless of population. The only change was to provide that Four (4) of the Eleven (11) councilmen would run at large, and all voters were given the right to vote for the residential councilmen.

The seven residential councilmen would be elected without reference to the total votes received by all councilmen.⁶

"VOTERS" promptly filed a supplemental complaint indicting the "Seven-Four Plan" for perpetuating unconstitutional apportionment. (R. 83)

⁵ Blackwater, Pungo, Princess Anne and Virginia Beach.

⁶ For example, 20 candidates file for election as follows:

8 contest for the 4 At Large councilmanic seats;

2 run for the Bayside residential seat;

2 run for the Kempsville residential seat;

2 run for the Lynnhaven residential seat;

1 runs for the Blackwater residential seat;

2 run for the Pungo residential seat;

1 runs for the Princess Anne residential seat;

2 run for the Virginia Beach residential seat.

The Blackwater and Princess Anne borough residential candidates would be elected without opposition. The 8 candidates running at large could receive the 8 highest number of votes and yet only 4 would be declared elected and the residential candidates from Bayside, Kempsville, Lynnhaven, Pungo and Virginia Beach receiving the highest number of votes between the two candidates running for the residential seat would be declared elected, although his total vote was less than the 8th highest candidate running at large.

The District Judge⁷ approved the "Seven-Four Plan".⁸

After "OFFICIALS" decided to seek an amendment to the Charter to comply with the District Court opinion of December 7, 1965, they never questioned the applicability of the "one man — one vote" principle to the City of Virginia Beach.

On appeal, the Court of Appeals for the Fourth Circuit, in a unanimous opinion (R. 116) reversed the Lower Court and held the plan unconstitutional and remanded the case for further proceedings.

ARGUMENT

I

INTRODUCTION

In view of the able amicus curiae brief of the Solicitor General documented by replete authorities relating to this appeal, which brief has been filed prior to the filing of the instant brief, "VOTERS" will primarily direct their brief to argument peculiar to the Virginia Beach case.

⁷ District Judge Walter E. Hoffman, who dissented from Judge Albert V. Bryan's majority opinion in the state reapportionment case of *Mann v. Davis*, (1962) 213 F. Supp. 577.

⁸ The District Judge recognized the tenuous posture of the "Seven-Four Plan" when measured by the "one man—one vote" principle stating (R. 110):

*** While the question is not free from doubt, this Court does not believe that the constitutional limitations of the 'one person, one vote, rule extend that far."

■

A. "OFFICIALS" WAIVED THE RIGHT TO ARGUE THE APPLICABILITY OF THE "ONE MAN—ONE VOTE" DOCTRINE TO THE ELECTION OF THIS CITY COUNCIL

The only time "OFFICIALS" made an issue of the applicability of the doctrine of "One man — One Vote" to local government was during their argument before District Judge Walter Hoffman prior to his ruling that the principle was applicable.⁹

The District Court gave each city involved in its opinion the option of going to the General Assembly and seeking a charter change to correct the malapportionment then existing, or of submitting to a Court order requiring elections on an at large basis. An order was entered on this opinion on December 7, 1965. (R. 82)

No appeal was noted from this order. "OFFICIALS" accepted the terms of the order and went to the General Assembly and obtained the charter change creating the "Seven-Four Plan".¹⁰

"VOTERS" filed a supplemental complaint contesting the constitutionality of the "Seven-Four Plan" (R. 83) which preserved rural representation by providing a residential councilman from boroughs containing populations that continued to be flagrantly disparate.

⁹ On December 7, 1965, Judge Hoffman handed down his opinion holding the principle was applicable to local government and declared the councils of the cities of Virginia Beach and Chesapeake to be malapportioned. (R. 78).

¹⁰ As a matter of legislative comity, the Charter changes bearing the unanimous endorsement of City officials are routinely granted by the Virginia General Assembly.

At the hearing on the supplemental complaint, "OFFICIALS" did not plead or brief the issue now raised regarding the applicability of "One man — One vote", nor did they do so on appeal before the Court of Appeals for the Fourth Circuit.¹¹

The issue of the applicability of "One man — One vote" to this case was settled by the District Court order of December 7, 1965, which was not appealed and the issue not having been presented to the Court of Appeals for the Fourth Circuit it cannot now be raised.¹²

B. THE "ONE MAN — ONE VOTE" PRINCIPLE PROTECTS THE VALUE OF A CITIZEN'S VOTE IN A COUNCILMANIC ELECTION

"VOTERS" submit that the applicability of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States is to be determined with reference to the individual's right that is the subject of the

¹¹ The questions presented to the Court of Appeals for the Fourth Circuit were stated in "VOTERS' " brief in that Court as follows:

"A. Is the Seven-Four Plan constitutional?

B. Are "VOTERS" entitled to a stay of the pending election under the 'Seven-Four Plan'?

C. Are "VOTERS" entitled to attorneys' fees?"

"OFFICIALS" adopted those questions, stating in their brief before the Fourth Circuit:

"The three questions stated in Voters' brief correctly present the ultimate issues of the case."

¹² *Corrigan v. Buckley*, 271 U.S. 323, 330, 331, 46 S.Ct. 521, 523, 524, 70 L. Ed. 969, (1926)

"*** it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. ***" (Emphasis added)

See also *Shelley v. Kraemer*, 334 U.S. 1, 8, 68 S.Ct. 836, 840.

protection, namely, his vote in an authorized governmental election.

The office or issue that is determined by the vote cannot affect the protection of the vote if we are to have representative government.

Prior briefs have noted the significant road signs leading to the logical decision in the instant case that was staked out by this Court in *Gray v. Sanders* (1963) 372 U.S. 368, *Wesberry v. Sanders*, (1964) 376 U.S. 1, *Reynolds v. Sims*, (1964) 377 U.S. 533.¹³

It is not necessary at the present time to take issue with any contention that a governmental body, including a state legislature *could* provide a system of appointing local governing officials if the system was not discriminatory and measured up to constitutional criteria in other respects. The Legislature of Virginia has seen fit to require the citizen to meet the same qualifications in order to cast a ballot for state legislative officials as for councilmen. Common laws control councilmanic elections, congressional elections and state legislative elections.¹⁴ These laws reflect the legislative intent of the deliberations of the Virginia Constitutional Convention of 1901-02 that city governments were dual in nature, discharging on one hand state services and on the other services unique to local government.¹⁵

¹³ 377 U.S. 555:

“... And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

¹⁴ Sections 24-176 through 24-290 of the Code of Virginia of 1950, as amended.

¹⁵ Journal of the Constitutional Convention of Virginia, 1901-02, Journal and Documents, Report of the Committee On The Organiz-

Virginia state law surrounds the councilmanic ballot with the same sanctity and protection as the congressional or legislative ballot, the same voting hours, the same election officials, the same control of poll books and the same manner of voting are provided. The laws regulating the qualification of candidates for the state legislature and the city council are the same.¹⁰

The constitutional requirement that dictated that the vote of every citizen be guaranteed equal weight and influence in the selection of those representatives who would fashion the laws relating to state services requires that the same guarantee be afforded the vote that will select the councilmen who will discharge the responsibilities of the intimate problems of city government.

The Council of the City of Virginia Beach has the primary responsibility for education, police protection, fire protection, sanitation and local highways.

ation And Government of Cities and Towns, Page 1:

"In carrying out these general ideas, it was necessary to bear constantly in mind the dual character of cities. In one sense, a city is a governmental agency of the State to carry out, within its territorial limits, the general policies of the State government.

"In another sense, a city is itself a government, local in the exercise of its functions; charged by the State with the government of the people resident within its limits, in accordance with their legitimate desires in all matters affecting them distinctively, and not related to the general welfare of the State at large."

¹⁰ Section 24-133 of the Code of Virginia of 1950, as amended.

"... nor shall the name of any candidate for the General Assembly, or for any city or county office, other than a party nominee as above mentioned, be printed on the ballots provided for the election, unless he file along with his notice of candidacy a petition therefor, signed by fifty qualified voters of his city, county, or district, as the case may be, witnessed as aforesaid and with like affidavits attached thereto."

This Court's opinion in *Fortson v. Morris* (1967) 385 U.S. 231, involved a legislative act that permitted delegates of the Georgia state legislature to select the state's governor under certain circumstances. The majority opinion was not relevant to the instant case where state law requires that city councilmen be determined in duly constituted elections. However, the language of Mr. Justice Fortas in his dissenting opinion is relevant and decisive.¹⁷

We submit — The Vote's The Thing!

A citizen's vote is entitled to equal protection without reference to the election in which it is cast.

C. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT WAS CORRECT IN HOLDING THE "SEVEN-FOUR PLAN" WAS AN UNCONSTITUTIONAL EVASION OF THE MANDATE OF REYNOLDS V. SIMS, (1964) 377 U.S. 533

Fear of orderly annexation as a result of the urban sprawl emanating from the City of Norfolk into Princess Anne County precipitated a "shot-gun" merger of the resort City of Virginia Beach, with a five man city council elected at large, and Princess Anne County, with six magisterial districts each having one supervisor assigned on a geographical basis without reference to population. An apparent prerequisite of the merger was to insure the seats of the two governmental bodies involved.

¹⁷ 385 U.S. 249:

*** A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless — it no longer serves the purpose of the democratic society — unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens provided that they are more numerous than those of differing views. That

"VOTERS" initial complaint brought a voluntary admission¹⁸ indicating unconstitutionality prior to the Lower Court opinion of December 7, 1965, so holding. (R. 78).

The fatal defect noted by all was the disparity of population between the various boroughs of the new city.

The purpose of the original plan was to insure the election of representatives from sparsely settled rural boroughs. This particular objective was doggedly retained by "OFFICIALS".¹⁹

As noted, the "Seven-Four Plan" made no changes in the geographical demarcations of the seven boroughs and, therefore, no change was made in the disparate distribution of population among the seven boroughs. The only change was to create four councilmanic seats to be filled by at large candidates and to give the voter in the heavily populated borough the right to vote for a rural oriented residential councilman. This somewhat sophisticated scheme did not in any way breathe constitutionality into the Plan.

This Court has condemned illegal vote weighting, re-

is the meaning and effect of the great constitutional decisions of this Court."

¹⁸ *Infra*, Footnote 4.

¹⁹ "OFFICIALS" key witness testified (R. 93, 94):

"Q. Is it fair to state, based on your testimony, that the motivating factor in the Council of the City of Virginia Beach deciding on the residential requirement for 7 of the 11 councilmen was to guarantee the election of at least a certain number of agriculturally-educated and oriented councilmen?"

"A. Well, I would say that the plan that was presented would insure those communities, or at least would indicate to the public, and would result in an election where the men with this background would serve on the Council, and with this knowledge."

ardless of whether the distortion is the result of a simple or a sophisticated scheme.²⁰

Circuit Judge Bryan in the opinion written for a unanimous Court, held that the "Seven-Four Plan" perpetuated the unconstitutionality of the apportionment of representation in Virginia Beach's government: (R. 121, 122)

"Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give, or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in representation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan. Manifestly, the discussion in *Fortson v. Dorsey*, supra, 379 US 433, 438 seemingly discounting the fear of sectionalism in a district's legislator was conditioned upon 'substantial equality of population' among the legislative districts there.

Moreover, confessedly, the Virginia Beach plan was purposed, and drafted with an eye, to include in the makeup of the council the representation of the peculiar interests of each borough. It was architected to give voice to the agricultural or non-urban con-

²⁰ *Reynolds v. Sims*, 377 U.S. 533, 562:

"*** Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'"

cerns of the smaller boroughs. However understandable, reasons of this kind may not be counted in appraising the Constitutionality of an apportionment. *Reynolds v. Sims*, 377 US 533, 562 (1964); *Ellis v. Mayor and City Council of Baltimore*, supra, 352 F2d 123, 128."

A balancing of urban and rural power was rejected by this Court as a rational factor in apportionment plans in *Davis v. Mann*, 377 U.S. 678, 692.²¹

Residence requirements were frowned upon when Chief Judge Haynsworth, sitting on a three judge statutory court, decided *O'Shields v. McNair*, (1966) 254 F. Supp. 708.²²

²¹ 377 U.S. 692:

"We also reject appellants' claim that the Virginia apportionment is sustainable as involving an attempt to balance urban and rural power in the legislature. * * *

²² 254 F. Supp. 713:

"The basic reapportionment question is gravely complicated by the presence in each plan of a 'negative residence' clause, which, superficially at least, appears to lend credence to the suggestion that the purpose to achieve a reasonable apportionment was too greatly compromised by a purpose to preserve the offices of some of the Senators now representing some of the smallest counties.

"*** By virtue of the districting, this provision operates to guarantee to some small counties a resident Senator while other counties of more than twice the population have no such protected right."

254 F. Supp. 714:

"But a construction most favorable to the validity of the provision does not obviate all of the difficulties. We may take judicial notice of the fact that the incumbent Senator from Calhoun should have little difficulty in winning one of the senatorial seats allotted the Orangeburg-Calhoun District. The effect of the negative residence clause is to exempt him from the need of campaigning, until one of his Calhoun County neighbors rises up to file against him. The provision, if effective, at all, is a continuing one, so, no matter how disaffected Orangeburg voters may become with him or any of his

If the Fourth Circuit had failed to reject the sophisticated discrimination effected by the "Seven-Four Plan", it would have pointed the way to a thicket of evasive maneuvers in future legislative, as well as local government apportionments.²³

The simplicity of the guidelines laid down by this Court in *Reynolds v. Sims*, 377 U.S. 533, produced rapid acceptance of representative reapportionments by at least 46 of the 50 state legislatures.

D. VIRGINIA'S LEGISLATIVE HISTORY SUPPORTS THE APPLICATION OF THE "ONE MAN — ONE VOTE" PRINCIPLE TO COUNCILMANIC APPORTIONMENT

The last Constitutional Convention held in Virginia was the Convention of 1901-1902, the first Constitutional Convention following the Civil War. This convention resulted in the promulgation of Section 121 of the Constitution (Appendix A, I), which required that where a city elected councilmen from wards (analogous to boroughs) the plan of apportionment had to provide, as far as practicable equal representation in proportion to the population

successors in future years and no matter how many likely aspirants there may be in a relatively populous Orangeburg, the Senator from Calhoun will have no opposition so long as no likely Calhoun man comes out to oppose him. *In view of the great disparity in the populations of the two counties, this constitutes some restriction upon the choices available to the voters of the district.*" (Emphasis Added.)

²³ If the "Seven-Four Plan" should be held constitutional by this Court, the Virginia Constitution could be amended to enlarge the House of Delegates to 140 members, with one Delegate being assigned to every city and county in Virginia, regardless of size, and the gross malapportionment would be justified by allowing the voters of each political subdivision to vote for the resident Delegate of the other subdivisions. Such a scheme would return us to the urban-rural imbalance of malapportioned representation that has so recently been corrected.

of each ward. To implement this constitutional guarantee, the General Assembly enacted Sections 15.1-803 and 15.1-806 of the Code of Virginia. (Appendix A, II).

The delegates to the 1901-02 Conventions were prophetic in their prediction regarding the complexity of municipal government. There were those at the Convention who attempted to resist writing into law a mandate that where wards were employed in a councilmanic structure those wards must contain as nearly as practicable the same number of people, by reason of their fear that wards containing a majority of negro citizens might be able to elect a negro councilman.²⁴

The predominant desire of the application of the "One Man — One Vote" principle was presented by Delegate Pollard of the City of Richmond, who stated that the vitality of city government required that representation on Council be in direct relation to the number of inhabitants within the respective wards.²⁵

²⁴ Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Vol. II, 1901-1902, p. 1950, Delegate Thom:

"... In almost every city in the Commonwealth there are a very large number of negroes who congregate in one special section of the city. If a suffrage plan is adopted which will disfranchise these negroes, there will still be under the article, as suggested by the committee, a requirement that the representation in the council shall be based upon the whole population in that ward, and will give to the white people in one ward from five to ten times the influence in the city council that the white man in another portion of the city will have. ..."

²⁵ Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Vol. II, 1901-1902, p. 1950, Delegate Pollard:

"Mr. Chairman, I hope it will be the pleasure of this committee

to sustain the report of the Committee on Cities and Towns. The gentleman from Norfolk is mistaken in supposing that any such danger as he has suggested is imminent. I would like to call the attention of the members of this committee to a condition of affairs which exists in the city of Richmond. Our condition but illustrates the importance of having such a rule as is laid down in the report of the committee. We have in this city six wards with population distributed very unequally among them. We have one ward that is nearly three times as large in population as any other ward, and yet this large ward, with immense property values, paying to the city treasury and to the State treasury often three, four or five times as much in personal taxes of this city and State, has only the same representation as is given to a ward having about one-third the population. The result has been that citizens living in certain parts of the city have three times the voice in the management of the city affairs as those in other portions of the city; and the further result has been that through the representation in the city council the minority of the people of the city of Richmond now rule the city, and that is one reason, gentlemen of the committee, that there has been so much complaint against our city government. It is because the lower portions of this city, having a small population, have the same representation in the council, and hold the better element of this city by the throats, and will not let them do what is best for the interests of this city. Take the outlying Clay ward which has been the ward in which there has been most growth. It has nearly three times the population of Jefferson ward, the ward just below us. Jefferson ward is a finished ward. Nearly all the streets in that ward are paved, nearly all the houses in that ward are supplied with gas and water connection, while out in Clay ward, with an area very much larger, they have refused to put in those conveniences, although Clay ward pays about three or four times as much taxes. What has been the result? The people desiring to build new houses, instead of building in the growing wards, where they would naturally have built if they could have gotten gas, water and culvert connections, have erected their homes on the suburbs, where they would not have to pay city taxes, which they would have been willing to pay if they could have gotten city conveniences. They have gone out and built little towns all around Richmond, and our city, instead of showing a growth of 25 per cent, as it has in almost every decade in its history, in the last ten years only increased about 3 per cent. The small wards, having control of the council, often succeed in having the money for improvements apportioned among the wards, irrespective of the size, the condition, and the needs of the wards. They pull up and put down new pavements, here in the center of the city, where we do not need them, and neglect portions of the city which are destitute of all city conveniences. I call your attention to our condition, not because I want you to put this clause into the Constitution just for the benefit of our city, but because it shows

what injustice may be done under the present state of the law. What has happened in Richmond is likely to happen anywhere. This is no new principal we are seeking to imbed in the law. Representation in the House of Delegates and in the Senate is of proportion according to population, and based on the census of the United States. We recognized the same principle when we reapportioned the representation in Congress according to population. It is a fundamental principle that should be embodied in the organic law — a guarantee to the citizens of the cities equal voice in the management of municipal affairs. We have applied to the Common Council for relief from this iniquitous condition, and they laugh in our faces, just because the representatives of the smaller wards are not willing to give up the unfair advantage which the condition gives them. They offer the flimsy excuse that if they give us representation according to our population, they would have to give larger representation to Jackson ward, the negro ward of the city. Why, there has not been a negro for years in the Common Council. The Democrats are elected by a large majority in Jackson ward to-day. We have Democrats representing the negroes in the council. It is a great injustice to leave it as it is, and I hope the committee will stand by the unanimous report of the Committee on Cities and Towns.

“***

“If it is not a fundamental principle that every citizen in the Commonwealth should have equal voice in the management of the affairs of his city, leave it out of the Constitution? If it is not a fundamental principle that the majority should rule in the cities, leave it out of the Constitution. The affairs of the city of Richmond come much closer to us than do the affairs of the State. The taxation we pay to the State is only forty cents on \$100, while it is \$1.40 on \$100 for the city. We get from the city police protection; we get fire protection, and we get our water and our light from the city. The affairs of the city come much nearer to our homes and our firesides than the affairs of the State. Why should men, in a free country, be allowed to discriminate against the citizens of the cities in this manner? Is this a free country? Are we to allow political cliques to hold by the throats a majority of the people of the cities? Is that fair? Is it just? Is that not a proper matter to guard against in the Constitution itself? Ought not the Constitution to guarantee to every citizen equal voice in the management of municipal affairs?

Gentlemen, I appeal to you not to allow the violation of this great principle. Though you allow it for the purpose of discriminating against the negro, the day will come, as it has come in this city, in the city of Danville, and in the city of Lynchburg, where they use it against the white man instead of against the negro. We ought not to violate a principle for a supposed difficulty in these cities that have appealed to you to leave their hands free.”

At least in Virginia the principle of "One Man — One Vote" as an essential prerequisite to maintaining representative government on a local level was recognized over one-half century ago.

E. WHEN "VOTERS" SUIT WAS ORIGINALLY FILED NO CIRCUIT COURT OF APPEALS HAD RULED REGARDING THE APPLICABILITY OF "ONE MAN — ONE VOTE" TO THE APPORTIONMENT OF REPRESENTATION ON CITY COUNCILS

After the filing of the instant suit the Court of Appeals for the Fourth Circuit settled the question in this circuit. *Ellis v. Mayor and City Council of Baltimore* (1965) 352 F. 2d 123.

In view of this development, "VOTERS" agree with that portion of Judge Bryan's opinion holding that a three judge court (R. 76) is inappropriate where the decision will be governed by the application of constitutional provisions already authoritatively established.²⁰

As a practical matter the purpose of Title 28 U.S.C.

²⁰ "Furthermore, we think that a three-judge court is also inappropriate because this litigation no longer presents a Constitutional question which is beyond the jurisdiction of a sole District Judge. The statute does not require three judges where the decision will be governed by the application of Constitutional principles already authoritatively established. *James & Co. v. Morgenthau*, 307 US 171, 172; *Harvey v. Early*, 160 F.2d 836, 838 (4 Cir. 1947). That the "one person, one vote" precept embraces councilmanic representation is now settled in this Circuit. *Ellis v. Mayor and City Council of Baltimore* (4 Cir. October 11, 1965); see also *Bianchi v. Griffing*, supra, 238 F. Supp. 997 (EDNY 1965) and authorities cited therein. Moreover, the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city is not denied by the defendants. What may now and subsequently have to be decided in these cases are matters well within the province and for the judgment of a one-judge court."

Section 2281 was complied with when the three judge court, in dissolving itself, decided the crucial issue, the applicability of "One Man — One Vote" to city council apportionment.

In view of the settled status of the question in the Fourth Circuit, its opinion was not required to and did not pass on the constitutionality of Section 117 of the Constitution of Virginia, (Appendix A, III) which attempted to grant power to the state legislature to deviate from the "One Man — One Vote" mandate of Section 121 of the Constitution of Virginia (Appendix A, I) and Sections 15.1-803 and 15.1-806 of the Code of Virginia of 1950, as amended. (Appendix A, II).

Absent this issue, the only question involved was the constitutionality of an amended charter provision that was essentially local in character. *Ex Parte Collins*, 277 U.S. 565; *Rorick v. Board of Commissioners of Everglades District*, 307 U.S. 208; *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218.

CONCLUSION

The "Seven-Four Plan" is a sophisticated unconstitutional plan of councilmanic apportionment that attempts to conceal the invidious discrimination perpetuated against heavily populated boroughs by allowing those voters to participate in their malrepresentation by voting for rural oriented councilmen from substantially under populated boroughs insured of election by reason of a residential requirement.

The judgement of the Court of Appeals for the Fourth Circuit should be affirmed and the case remanded to the

United States District Court in accordance with the mandate of the appellate court.

Respectfully submitted,

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Dated April 7, 1967

CONSTITUTION OF VIRGINIA

Sec. 121. City council, composition, how elected, powers and duties; ineligibility of members to certain offices; powers and duties as to reapportionments; when mandamus against council lies.

There shall be in every city a council, composed of two branches, having a different number of members, whose powers and terms of office shall be prescribed by law, and whose members shall be elected by the qualified voters of such city, in the manner prescribed by law, but so as to give, as far as practicable, to each ward of such city, equal representation in each branch of said council in proportion to the population of such ward; but the General Assembly may permit the council to consist of one branch.

No member of the council shall be eligible, during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council by election or appointment.

The council of every city may, in a manner prescribed by law, increase or diminish the number, and change the boundaries, of the wards thereof, and shall, in the year nineteen hundred and thirty-three, and in every tenth year thereafter, and also whenever the boundaries of such wards are changed, reapportion the representation in the council among the wards in a manner prescribed by law; and whenever the council of any such city shall fail to perform the duty so prescribed, a mandamus shall lie on behalf of any citizen thereof to compel its performance.

CODE OF VIRGINIA OF 1950, As Amended

§ 15.1-803. Number of wards in city; how changed.— In each city of this Commonwealth there shall be as many wards as the city council may establish; but whenever, by the last United States census or other enumeration made by authority of law, it shall appear that the population in any ward exceeds that of any other by so much as three thousand inhabitants, or whenever in the opinion of the council it is necessary, or whenever it becomes necessary because the corporate limits of the city have been extended or contracted, the city council shall redistrict the city into wards, change the boundaries of existing wards, or increase or diminish the number of wards, so that no one ward shall exceed any other ward in population by more than three thousand inhabitants. But in no case shall the city council redistrict the city into wards or change the boundaries of existing wards, except in so far as it may be necessary to change such boundaries for the purpose of attaching newly annexed territory of such existing ward or wards as may be contiguous thereto, oftener than once every five years, except upon a recorded vote of three-fourths of the members elected to the council or three-fourths of the members elected to each branch thereof when the council is composed of two branches; and in every such case the reason therefor shall be set forth in the ordinance providing for such redistricting.

A mandamus shall lie on behalf of any citizen to compel the performance by the council of the duty so prescribed. (Code 1950, § 15-396; 1962, c. 623.)

Cross reference.—For constitutional authority, see Va. Const., § 121.

§ 15.1-806. Council to reapportion representation among wards.—The council in every city shall, in the year nineteen hundred and fifty-three and every tenth year thereafter, also whenever the boundaries of the wards of the city are changed, prescribe by ordinance the number of members of each branch of the council and reapportion the representation therein among the wards, so as to give, as far as practicable to each ward of such city, equal representation in the council and in each branch thereof in proportion to the population of each ward. In determining such population, the council shall be governed by the last United States census, or by an enumeration as provided for in § 15.1-17, or such other enumeration as may be provided for by law. If by any change of the boundaries of a ward, or by the increase or diminution of the number of wards, any officer, who is required by law to be a resident of the ward from which he is elected or appointed, shall become a resident of a different ward, such officer shall, notwithstanding, serve as such to the end of his term. (Code 1950, § 15-399, 1962, c. 623.)

III

CONSTITUTION OF VIRGINIA

Sec. 117. General Assembly shall enact laws for government of cities and town; how special act therefor passed; as to city charters existing or adoption of Constitution.

(a) General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in article four of this Constitution, and then only by a recorded vote of two-

thirds of the members elected to each house. But each of the cities and towns of the State having at the time of the adoption of this Constitution a municipal charter may retain the same, except so far as it shall be repealed or amended by the General Assembly; provided, that every such charter is hereby amended to conform to all the provisions, restrictions, limitations and powers set forth in this article, or otherwise provided in this Constitution.

(b) The General Assembly may, by general law or by special act (passed in the manner provided in article four of this Constitution) provide for the organization and government of cities and towns without regard to, and unaffected by any of the provisions of this article, except those of sections one hundred and twenty-four, one hundred and twenty-five (except so far as the provisions of section one hundred and twenty-five recognize the office of mayor and the power of veto), one hundred and twenty-six and one hundred and twenty-seven of this article, and except those mentioned in subsection (d) of this section. The term "council", as used in any of said sections, shall include the body exercising legislative authority for the city or town, and all ordinances enacted and resolutions adopted by such body shall have the same force and effect for all purposes, as if enacted or adopted in accordance with the provisions of section one hundred and twenty-three of this article. But such organization and government shall apply only to such cities or towns as may thereafter adopt the same by a majority vote of those qualified voters of any such city or town voting in any election to be held for the purpose, as may be provided by law.

(c) The General Assembly, at the request of any city or town, made in manner provided by law, may grant to

it any special form of organization and government authorized by subsection (b) of this section, and subject to all of the provisions of that subsection, except that it shall not be necessary for such city or town to thereafter adopt the same.

(d) Any laws or charters enacted pursuant to the provisions of this section shall be subject to the provisions of this Constitution relating expressly to judges and clerks of courts, attorneys for the Commonwealth, commissioners of revenue, city treasurers and city sergeants.

(e) Any form of organization and government authorized by any provisions of this section which may have been adopted heretofore by any city or town pursuant to any act of the General Assembly enacted before such provisions became effective, and which is now in operation, is hereby declared legal and valid ab initio, and shall have the same force and effect as if it had been authorized by this Constitution at the time of its adoption.

IN THE
Supreme Court of the United States

October Term, 1966

FRANK A. DUSCH, ET AL.,

Appellants,

**J. E. CLAYTON DAVIS, ROLLAND D. WINTER
CORNELIUS D. SCULLY AND
HOWARD W. MARTIN,**

Appellees.

On Appeal from the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR APPELLANTS

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Dated April 15, 1967

IN THE
Supreme Court of the United States

October Term, 1966

NO. 724

FRANK A. DUSCH, ET AL.,

Appellants,

v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER
CORNELIUS D. SCULLY AND
HOWARD W. MARTIN,

Appellees.

On Appeal from the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR APPELLANTS

**THE APPLICABILITY OF ONE MAN, ONE VOTE PRINCIPLES
WAS RAISED BELOW**

While the question of the applicability to local governing bodies of one man, one vote principles as enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964), may not have been presented in precise terms to the Court of Appeals for the

Fourth Circuit, no one can seriously argue that the issue was not presented to and decided by that court. The question framed by Voters in their appeal below was "Is the Seven-Four Plan constitutional?" This is really two questions in one because it first requires a determination that *any plan* is subject to the United States Constitution. The Court of Appeals made such a determination, stating in part:

"The principle of one-person-one-vote extends also to the level of representation, and exacts approximately equal representation of the people—that each legislator, State or municipal, represent a reasonably like number in population. . . ." (R. 119)

Yet, even if the opinion of the Court of Appeals had failed to show that the issue was explicitly raised below, such is not required anyway. This Court has held that no more is required than that the record as a whole show that the matter was brought to the attention of the court, either directly or indirectly.

For example, in *Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590 (1954), the issue was whether Braniff's aircraft attained a situs within Nebraska for the purpose of state taxation. Both in the lower court and in this Court, Braniff relied solely on the commerce clause in maintaining that no situs was acquired. At no time was a due process argument mentioned. In holding that the point was nevertheless properly raised, the Court said (pages 598-99):

"While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare

question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, and cases cited; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland ed.) 149 *et seq.*"

In *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court, in discussing the applicable principles, said:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

"Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." (Footnotes omitted)

Voters contend that in order to be able to argue here the applicability of one man, one vote Officials should have separated the question posed by Voters into its two com-

ponents.* This is not required by logic or by prior decisions of the Court.

**FLEXIBILITY IS ESSENTIAL IN APPLYING ONE MAN,
ONE VOTE PRINCIPLES TO LOCAL GOVERNMENT**

In his enthusiasm for a full application of one man, one vote principles of *Reynolds* to the broad spectrum of local governing bodies the Solicitor General presses for an automatic application of rigid mathematical rules. He refuses to acknowledge that there are any differences between state and local legislative bodies. It would indeed be unfortunate for this Court to make the same error.

Three cases cited by the Solicitor General illustrate our position that deviation from strict population based standards may be permissible when supported by reason.

Blaikie v. Wagner, 258 F. Supp. 364 (S.D.N.Y. 1965) upheld the apportionment of the thirty-seven member council of New York City. While twenty-seven councilmen are elected from districts of substantially equal population, two additional councilmen are elected from each of the five boroughs which range in population from 221,991 for Staten Island to 2,627,313 for Brooklyn. The two borough councilmen are elected at large by the voters of the borough. No party may nominate more than one candidate to be elected at large in any borough and no one may vote for more than one at large candidate. Reflecting the importance of recognizing the diverse character of the voting population and the broad range of local problems, the court inquired (pages 367-68):

* The reason for separating the question in this Court is that it has never before been presented here. Such was not necessary in the Court of Appeals because it had already decided the precise question in *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123 (4th Cir. 1965).

"What would the councilman from Tottenville, Staten Island, know from direct and daily experience of the local problems of Canarsie, Brooklyn, or the councilman from the Westchester line of the Bronx know of the racial and housing congestion problems of the lower east side of Manhattan? The first focal point for judicial scrutiny is whether the councilmen representing Canarsie and Tottenville can by teaming up together impose the will of a small number of voters upon a much larger group who by reason of inadequate representation are unable to resist."

The avowed purpose of the plan was to provide minority party representation to all boroughs. Despite the deliberate disproportion of voting strength favoring the less populated boroughs, the court found a "rational justification" for the plan and held that it did not violate the equal protection clause.

The court in *Blaikie* was concerned with representation of national and racial minorities. At pages 70-72 of his brief the Solicitor General exhibits a concern for racial minorities. At Virginia Beach our concern is with an economic minority. Although agrarians constitute a minority of the city's population, agriculture is the city's largest industry and more than one-half of its area is rural. We are aware of no other constitutional means of guaranteeing a voice in city affairs to this important minority group.

Another decision recognizing the important need for an element of discretion in the manner in which local government shall conform to one man, one vote principles is *Town of Greenburgh v. Board of Supervisors*, 157 New York Law Journal, No. 29, p. 18 (Feb. 3, 1967). In acknowledging the need for flexible rather than rigid standards and for a consideration of local conditions and problems, the Supreme Court of New York State said:

"Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one county may be unacceptable in another (cf. *Reynolds v. Sims*, supra, 377 U.S. 533, 578, *Swann v. Adams*, supra). The equal protection clauses do not require the application of rigid rules in all cases of legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between state legislative bodies and county boards of supervisors which justify a different approach to county reapportionment problems, than that which has been approved, so far with respect to state plans. . . .

"The prohibition of the equal protection clauses goes no further than the invidious discrimination (cf. *Williamson v. Lee Optical Co.*, supra, 348 U.S. 483, 489); and a legislative apportionment plan which seeks to preserve a separate voice in legislative processes, to the small, as well as the large communities if it can be effected without such discrimination, neither violates that prohibition, nor is it because of that purpose, irrational or unreasonable. . . ."

Only several months ago this Court again recognized that mathematical precision should not be expected in every case, even for state legislatures. *Swann v. Adams*, U.S., 17 L. ed. 2d 501 (Jan. 9, 1967). While admitting that variations would be permitted if there is "a satisfactory explanation grounded on state policy," the Court struck down the Florida legislative reapportionment plans because

there appeared no acceptable reasons for population variances among the districts.

CONCLUSION

The Seven-Four Plan is not subject to any of the usual constitutional objections. It does not vest control of the council in the rural areas, it does not seek to perpetuate any individuals in office and it does not discriminate against racial groups. As pointed out at pages 22-24 of our opening brief, the Seven-Four Plan is a common sense approach to the unique situation prevailing at Virginia Beach.

The plan should be held to be constitutional and the judgment below reversed.

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SUPREME COURT OF THE UNITED STATES

No. 724.—OCTOBER TERM, 1966.

Frank A. Dusch et al.,
Appellants,
v.
J. E. Clayton Davis et al.

On Appeal From the United
States Court of Appeals for
the Fourth Circuit.

[May 22, 1967.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1963 the City of Virginia Beach, Virginia, consolidated with adjoining Princes Anne County, which was both rural and urban; and a borough form of government was adopted. There are seven boroughs, one corresponding to the boundaries of the former city and six corresponding to the boundaries of the six magisterial districts. The consolidation plan was effected pursuant to Virginia law¹ and the charter embodied in the plan was approved by the legislature.²

Three boroughs—Bayside, Kempsville, and Lynnhaven—are primarily urban. Three—Blackwater, Princess Anne, and Pungo—are primarily rural. The borough of Virginia Beach, centering around its famous ocean beach and bay, is primarily tourist.

Electors of five boroughs, having exhausted attempts to obtain relief in the state courts,³ instituted this suit against local and state officials claiming that the consolidation plan in its distribution of voting rights violated the principle of *Reynolds v. Sims*, 377 U. S. 533, and

¹ Virginia Code 1950, Tit. 15, Art. 4, c. 9.

² Acts of Assembly, 1962, c. 147. The consolidation plan was an interim one, the idea being that another system would be initiated not sooner than 1968 and not later than 1971.

³ *Davis v. Dusch*, 205 Va. 679, 139 S. E. 2d 25.

asking for the convening of a three-judge court. The three-judge court held that its jurisdiction had not been established because the issue was local in character and transferred the cause to the District Court.

The District Court held the original allocation invalid as denying voter equality and stayed further proceedings to allow the city an opportunity to seek a charter amendment at the 1966 session of the State Legislature. The charter was amended to provide for the Seven-Four Plan now being challenged.* Under the amended charter, the council is composed of 11 members. Four members are elected at large without regard to residence. Seven are elected by the voters of the entire city, one being required to reside in each of the seven boroughs. Pursuant to leave of the District Court, appellees filed an amended complaint challenging the validity of the Seven-Four Plan. The District Court approved this plan. The Court of Appeals reversed, 361 F. 2d 495. The case is here on appeal (28 U. S. C. § 1254 (2)) and we postponed the question of jurisdiction to the merits. 385 U. S. —.

For the reasons stated in *Moody v. Flowers*, ante, p. —, the case is not one for a three-judge court, the charter being local only and not of statewide application.

In *Sailors v. Board of Supervisors*, ante, p. —, we reserved the question whether the apportionment of municipal or county legislative agencies is governed by *Reynolds v. Sims*. But though we assume *arguendo* that it is, we reverse the Court of Appeals. It felt that *Reynolds v. Sims*, required "that each legislator, State or Municipal, represent a reasonably like number in population," 361 F. 2d, at 497, pointing out that Blackwater, where 733 people live, will have the same representation as Lynnhaven with 23,731 and Bayside with 29,048 and Kempsville with 13,900. The Court of Appeals reaffirmed

* Acts of Assembly of 1966, c. 39.

what it had decided in *Ellis v. Mayor and City Council of Baltimore*, 352 F. 2d 123, 128, that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people without regard to race, sex, economic status, or place of residence within a State." And the court held that the provision for four city-wide members "does not remedy or in any way affect the disproportion of representation of the 7 borough members." 361 F. 2d, at 497.

The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by a vote of all the electors in the city. The fact that each of the seven councilmen must be a resident of the borough from which he is elected, is not fatal. In upholding a residence requirement for the election of state senators from a multi-district county we said in *Fortson v. Dorsey*, 379 U. S. 433, 438:

"It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus, in fact he is the county's and not merely the district's senator."

By analogy the present consolidation plan uses boroughs in the city "merely as the basis of residence for candidates, not for voting or representation." He is nonetheless the city's, not the borough's councilman. In *Fortson* there was substantial equality of population in

the senatorial districts, while here the population of the boroughs varies widely. If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow. But on the assumption that *Reynolds v. Sims* controls, the constitutional test under the Equal Protection Clause is whether there is an "invidious" discrimination. 377 U. S., at 561. As stated by the District Court:

"The principle and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. . . . the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As

the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster."

The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolis in relation to the city, the suburbia, and the rural countryside.⁵ Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur in the result.

⁵The population of the seven boroughs is:

Blackwater	733
Pungo	2,504
Seaboard	7,211
Kempsville	13,900
Lynnhaven	23,731
Bayside	29,048
Virginia Beach	8,091

It is obvious that, if the percentage of qualified voters is in accord with the population, Lynnhaven and Bayside, if united in their efforts, could elect all 11 councilmen even though the election were at large.